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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-224

JOSEPH ALFRED TANNER AND
JACK ALTER PEARL,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions, Statutes and Court Rule Involved	6
Statement of the Case	7
Reasons for Granting the Writ	37
CONCLUSION	47

AUTHORITIES CITED

Cases

Benton v. Maryland, 395 U.S. 74	5
Mesarosh v. United States, 352 U.S. 1	3, 39
Re Winship, 397 U.S. 358	4
Silverthorne Lumber Co. v. United States, 251, U.S. 385	40, 41, 42
United States v. Edmons, 432 F.2d 577 (C.A. 2, 1970)	39
United States v. Persico, 305 F.2d 534, 536 (C.A. 2, 1962)	6
United States v. Tanner, 279 F. Supp. 457 (N.D. Ill. 1967)	1

PAGE

U.S.A. v. Cupp and Pearl, No. 3727 Crim., 1964, U.S.D.C. W.D. Mich. 8

Wong Sun v. United States, 371 U.S. 471 39

STATUTES AND COURT RULES

18 U.S.C. § 371 6

18 U.S.C. § 837 ..... 6, 7

18 U.S.C. § 1363 7

18 U.S.C. § 1992 6

18 U.S.C. § 2275 ..... 5, 6, 7, 27n

28 U.S.C. § 2541 2

Rules

United States Supreme Court Rule 23(1)(i) ... 2n

Rule 33, F.R. Cr. P. 6

APPENDIX

PAGE

Opinion of the Court of Appeals Sought to be Reviewed A1

Judgment of the Court of Appeals A22

Statutes and Court Rule Involved A24

18 U.S.C. § 837 ..... A24

18 U.S.C. § 1992 ..... A26

18 U.S.C. § 2275 ..... A26

Rule 33, F.R. Cr. P. A27

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Petitioners, Joseph Alfred Tanner and Jack Alter Pearl, jointly pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, described *infra.*

Opinions Below

The opinion of the Court of Appeals, printed in the appendix hereto, *infra,* is not yet reported. The District Court rendered a lengthy opinion on pre-trial motions which is reported as *United States* v. *Tanner,* 279 F. Supp. 457 (N.D.Ill. 1967), is printed in the Appellants' Joint Ap-

pendix in the Court below*, and, insofar as here pertinent, is excerpted at pp. 14-15, *infra*. The District Court also rendered an opinion, unreported, on pre-trial motions in the separate trial of a severed co-defendant, which is printed in the Appellants' Joint Appendix in the Court below at 934a-960a, and insofar as here pertinent, is excerpted at p. 18, *infra*.**

Jurisdiction

The judgment of the Court of Appeals was entered on March 3, 1972. The Court of Appeals by order denied a timely petition for rehearing on June 9, 1972. By order of Mr. Justice Rehnquist, the time within which to file this joint petition for certiorari has been extended to August 8, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

Petitioners were convicted on federal charges of bombing a vessel and railroad tracks during a maritime labor dispute.*** A co-defendant, Cupp, was the indispensable prosecution witness. Cupp switched allegiance between the Government and the defense sides in this case at least six times, most recently again, post-trial and while the within

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* The lengthy Appellants' Joint Appendix in the Court below (11 volumes, 5,554 pages) is not included in the portions of the record certified and transmitted to this Court by the Clerk of the Court below under Rule 21(1), as we understand that the office of the Clerk of this Court discountenances such voluminous transmittals at the stage of the filing of the petition for certiorari.

** Neither of the above mentioned Opinions of the District Court rendered upon pre-trial motions appears to be of the category of opinions referred to in Rule 23(1) (i).

*** No one was injured, and such injury was not charged.

appeals were pending in the Court below, when Cupp offered petitioners recantation of his prosecution testimony. Cupp's testimonial character may be unique in the annals. He is undisputedly and self-admittedly a chronic liar of phenomenal extemporaneous prevarications skills exhibiting a kind of genius. Before Cupp testified against petitioners, the Government undisputedly subjected him to coercions and inducements, the coercions being intensified after the Government learned through an adjudicatedly unconstitutional seizure of secret records of defense counsel that Cupp in one of his pre-trial switches had been secretly cooperating with the defense side and had made recantational tape recordings for the defense in which he accused the Government of coercion, inducement and subornation. The questions are:

1. In view of Cupp's atrocious testimonial acrobatics and the Government's repellent dealings with him, can petitioners' convictions be tolerated under the supervisory power, the due process clause, and the rule of *Mesarosh* v. *United States*, 352 U.S. 1, 9, that "The dignity of the United States Government will not permit the conviction of any person on tainted testimony"?

2. Was the Government's ultimate obtaining of Cupp's testimony as a prosecution witness "poisoned fruit" of the unconstitutional seizure of the secret records of the defense attorneys, records which revealed to the Government that Cupp had secretly crossed over to the defense side, whereupon the Government subjected Cupp to vindictive renewed coercions unremittingly for a year and a half until he broke to the Government's will?

3. Did the unconstitutional seizure of the secret defense files taint and abort the case on further grounds of viola-

tion of due process and right to counsel, since thereby the Government unconstitutionally learned the entire secret defense-legal position and became enabled unconstitutionally to thwart and destroy it?

4. When Cupp in this trial recanted his statements contained in the unconstitutionally seized tapes and uncorroboratedly testified instead that in those and in other tapes a co-defendant and a reputable defense attorney had fed him false rehearsed scripts to recite in the tape recordings on promises of money, was it error to deny the defense requests at the trial to play the Cupp tapes (or even to introduce unchallengedly accurate transcripts) so that the jurors might judge for themselves as to the verisimilitudes?

[Questions 5 to 12 are not argued in this Petition but are preserved in event of granting of certiorari.]

5. Re *Winship*, 397 U.S. 358, having ruled for the first time that the reasonable doubt standard in criminal prosecution is rooted in constitutional due process, is this a case meriting certiorari to review whether (a) the Trial Court erred in refusing to submit the case to the jury on Cupp's testimony because as a matter of law reasonable men could not differ in being unable to believe such a witness beyond a reasonable doubt; and (b) the Trial Court erred in denying petitioners' requests for special instructions on Cupp's credibility, on reasonable doubt as to testimony of a witness like Cupp, and on corroboration of the accomplice testimony of Cupp?

6. Were petitioners denied a fair trial by the inflammatory closing summation of the Prosecutor which practically turned the jury into a mob, thereby depriving petitioners of any chance for a "fair and impartial tribunal" on the win-or-lose issue of Cupp's credibility?

7. Is the case unconstitutionally tainted by electronic monitoring.

8. Did the Court below err in denying petitioners' motion to remand the case to the District Court for new trial on the ground of the newly discovered post-trial evidence of Cupp's latest offers of recantation; and in denying petitioners' alternative motion that the Court below should itself entertain these latest recantation proofs as a judicial duty under the supervisory power and the due process clause in view of Cupp's astounding history of utter disregard for the oath in this case?

9. In view of the pattern of partial affirmance and partial reversal in the Court below as to the several trial conviction counts, should the case be remanded to the District Court for new trial or resentencing (*Benton* v. *Maryland*, 395 U.S. 74)?

10. Are petitioners' convictions under Count 7 void for lack of federal jurisdiction of the subject matter (18 U.S.C. § 2275), a question which is of dispositive concern for petitioner Pearl, whose Count 7 conviction herein is the only remaining conviction count against him as the result of the reversal of the other conviction counts by the Court below?

11. The co-defendant Cupp having been separately tried, and convicted on three counts, under this same indictment prior to the trial of petitioners, and the Court below having reversed convictions of other defendants under all of those three counts on grounds which are applicable to Cupp (double jeopardy, duplicity, lack of federal jurisdiction of the subject matter), it has now resulted retrospectively that Cupp is totally absolved of any triable conviction count

under this indictment, giving rise to the derivative (and we believe unprecedented) question of a still further due process aggravation against petitioners themselves through the Government's having used its prosecutive pressures against Cupp to coerce him to testify against petitioners, when, as now appears, the Government's whole conviction case against Cupp was a legal nullity *ab initio*?

12. Should our above claims of error be given the benefit of the principle enunciated in *United States* v. *Persico*, 305 F. 2d 534, 536 (C.A. 2 1962), that where the Government's case rests entirely upon the uncorroborated testimony of an accomplice and co-conspirator who had the strongest possible reasons to become a Government witness, and whose testimony betrayed inconsistencies, the Appellate Court must "scrutinize any claimed error with extreme care since there is grave possibility of prejudice to the defendants in a case such as this by error which might in other circumstances be deemed relatively minor * * *".

Constitutional Provisions, Statutes and Court Rule Involved

The case involves the Fourth Amendment (search and seizure), the Fifth Amendment (due process, double jeopardy), the Sixth Amendment (right of counsel, confrontation) of the United States Constitution. It also involves 18 U.S.C. §371 (conspiracy), 18 U.S.C. §837 (transportation of explosives), 18 U.S.C. §1992 (wrecking railroad facilities), 18 U.S.C. §2275 (bombing vessels), and Rule 33 of the Federal Rules of Criminal Procedure (new trial). The statutes are printed in the Appendix hereto, *infra*.

Statement of the Case

This petition seeks review of a judgment of the United States Court of Appeals for the Seventh Circuit which partially affirmed and partially reversed respective final judgments of the United States District Court for the Northern District of Illinois, Eastern Division, entered June 16, 1969, after a jury trial. Petitioners Tanner and Pearl were each convicted on one conspiracy count and three substantive counts charging acts of physical violence against property. Each petitioner was sentenced to five years on each count concurrently (27a, 31a-43a).

On appeal, Pearl's conviction for conspiracy (Count 1) was reversed on the ground of double jeopardy. Tanner's conviction under Count 1 was affirmed. Pearl's and Tanner's convictions under Count 3 (transportation of explosives, 18 U.S.C. § 837) were reversed for duplicity. Pearl's and Tanner's convictions under Count 4 (destruction of a dock and vessel within the special admiralty and territorial jurisdiction of the United States, 18 U.S.C. § 1363), were reversed for lack of Federal subject matter jurisdiction. Pearl's and Tanner's convictions under Count 7 (bombing of the same vessel, the Howard L. Shaw, 18 U.S.C. § 2275) were affirmed.

Tried together with Tanner and Pearl were defendants named Rice and Chipman, whose convictions on the conspiracy count were affirmed and on the transportation count reversed under the duplicity ruling.*

* Since Rice and Chipman received suspended sentences on the conspiracy count, the disposition in the Court of Appeals left them free of any jail sentence.

The fifth defendant, Alvin Junior Cupp, was severed and was convicted and sentenced to ten years in a prior separate trial (15a-16a), but shortly after he testified for the Government in the within trial he was freed, having served about one year (29a).

The acts charged in the indictment occurred during a widespread maritime labor dispute in the Great Lakes shipping industry in 1963. The defendants were unionists. The Government's theory of the case is that Tanner, an official of one of the unions, and Pearl acting as Tanner's lieutenant, used the services of Cupp to do bombings and of Rice and Chipman to transport explosives (with Cupp).

The present indictment was filed in January 1967. In 1964-1965 Cupp and petitioner Pearl had been prosecuted in Marquette, Michigan for similar federal crimes during the same labor dispute, Cupp having pleaded guilty to one count of conspiracy in the Marquette case, and Pearl having been granted a dismissal (1503a; 5468a-5471a; *U.S.A.* v. *Cupp and Pearl*, No. 3727 Crim., 1964, U.S.D.C., W.D. Mich.). In March 1965 Cupp began a five year sentence in the Marquette case, and from then until April 1966 when Cupp gave Grand Jury testimony against the present petitioners and Chipman and Rice, Cupp was subjected to various ministrations by the Government to break down his unwillingness to testify. He was arbitrarily subjected to solitary confinement (396a, 410a-411a). He was "busted", i.e. drastically punished (without cause) by being assigned to the prison boiler room for more than six months (1100a-1120a, 2475a-2476a). He was cruelly shifted from a brief respite on a prison "honor farm" at Terre Haute to the horrors of the Cook County jail in Chicago for intensified

federal interrogation (1036a, 1044a-1068a), where they kept at him for four months until they broke him in April 1966 as aforesaid (381a-385a, 507a). Cupp swore at his separate suppression hearing and trial that he finally submitted to become a Grand Jury witness for the Government because he could not stand the Cook County jail any more. E.g., 385a-394a, 413a-428a, 433a-482a, 485a-501a, 505a-506a, 512a-513a, 517a-518a, 590a-599a-609a, 688a-696a, 706a-711a, 785a-788a, 825a-840a (see especially), 861a-879a, 1100a-1120a, 1128a-1130a. In this testimony Cupp included exhaustive details of the Government's allegedly suborning him in the Grand Jury testimony he finally gave in April 1966; and of the Government's threats and promises regarding his parole hopes (see especially 488a, 490a, 512a-513a, 1128a-1130a).

Cupp was allowed to go back to Terre Haute from Cook County Jail after testifying before the Grand Jury in April 1966 (507a). In his separate suppression hearing and trial Cupp said United States Attorney Hanrahan had promised him help on the parole effort (1128a-1130a) but that Mr. Hanrahan had also said, when Cupp said he had a good chance of getting parole, yes, "if we don't step in" (512a-513a). Cupp testified that his continuing contact with the Government during his second stay at Terre Haute (April-December 1966) was also in preparation for his becoming a double agent to trap his own attorney, Mr. Mann, and high marine union officials, after he became released on parole, which occurred December 23, 1966, whereupon he performed several attempted double agent missions (511a-526a, 530a-532a, 534a-545a, 586a-609a, 715a-728a, 730a, 754a-755a, 772a, 816a-818a). He also said that Government authorities in Washington, D.C. finally ordered cessation

of this double agent activity (527a-530a). In connection with the double agent phase, Cupp testified that he was used by the Government to carry out a great deal of electronic bugging on the intended victims (522a, *et seq.*, 540a, *et seq.*, 542a-545a, 592a, 595a-596a, 608a, 696a-701a, 755a-756a, 780a-782a).

Cupp testified in his separate suppression hearing and trial that after he completed his double agent activities and the defendants had been indicted herein (January 1967), he enjoyed a period of great financial bounty from the Government until July 1967 (545a-585a, 609a-615a, 620a-621a, 665a-666a, 1480a-1495a). Those financial benefits included some thousands of dollars of cash or of check payments in grossly inflated amounts for supposed Grand Jury witness and travel fees for both Cupp and his wife, the obtaining for Cupp of a $2,000.00 unsecured loan at a Chicago bank on which Cupp never made any payments, luxurious hotel and air travel junkets for Cupp and his whole family, a well paid job as a bus driver for which Cupp had no previous training, and a promise of $20,000.00 in reward money ($10,000.00 from the Upper Lakes Steamship Company and $10,000.00 from the Government).

In late May or early June 1967 Cupp secretly sought out defense attorneys in this case. Meetings were arranged for Cupp to make tape recordings, with Pearl and a defense investigator (Broady), all undisputedly done at Cupp's initiative (119a-224a). For example, summarizing the typewritten transcript of the Cupp tape of July 2, 1967*:

* This transcript is in the record via defense pre-trial motions; this transcript is of one of the tapes which the Trial Court refused to let the Jury hear.

(1) The entire item, even in the typewritten transcript form, indicates from beginning to end that Cupp was speaking spontaneously and without coaching; (2) at 119a-124a, 152a-153a, 157a-163a, and 167a-202a, Cupp on this tape stated voluminous details of coercion by the Government to obtain his Grand Jury testimony; (3) at 119a-124a, 126a-157a, 163a, 210a-214a, Cupp gave in like detail his story of the Government's financial inducements upon him; (4) at 125a, 171a, 196a-197a, and 201a-202a, Cupp gave details of how the Government fabricated and rehearsed with him his Grand Jury testimony; (5) at 163a-167a, Cupp described electronic monitoring done by the Government in investigating and preparing this case; (6) at 202a-212a, and 215a-223a, Cupp gave details of the Government's having used him as a double agent to try to trap defense attorneys and high union officials into bribing him; (7) at 126a Cupp denied that he had any fear of his co-defendants.

On July 16, 1967, in preparation for another secret meeting with Cupp, Pearl had arranged to meet defense attorney William S. Evans in Chicago to convene with Cupp and a Court reporter to notarize the Cupp tapes and the typewritten transcripts, but the FBI thwarted this purpose by intercepting Pearl and Cupp, arresting Pearl on a phony "draft card charge" and seizing the briefcase of defense records which Pearl was holding for Mr. Evans, before Pearl and Cupp could make contact with Mr. Evans (78a-84a, 104a-117a). This arrest and seizure were ultimately ruled unconstitutional by District Judge Marovitz (4560a-4561a), and the draft card charge was dismissed (N.D.Ill., E.D., 67 C.R. 456, Docket Entries, p. 3), but meanwhile the Government had torpedoed the entire secret defense strategy based on Cupp's revelations, and had clapped

Cupp back into jail immediately after the July 16, 1967 arrest and seizure, subjecting him thereafter to renewed pressures which we next describe.

Here are Cupp's words as to what happened when the FBI brought him to the Federal Building in Chicago after they had intercepted him with Pearl on July 16, 1967:

> "A. * * * This was Sunday afternoon about 2:00, * * *. (1446a)
>
> * * * * * *
>
> And [FBI Agent] Meyers walked up in front and he said, 'Let's have that gun, Billy.' (1446a)
>
> * * * * * *
>
> Q. Had you previously told Meyers that you had a gun? A. No, Meyers knew I had a gun when I was arraigned in front of the Commissioner in January of '67." (1447a)
>
> * * * * * *
>
> Q. Did they question you about the tapes? A. No. All the time that these tapes were being played, Werksman, he would snarl at me and he would turn around and he would say, "You son-of-a-bitch, you son-of-a-bitch."
>
> And Mr. Morrissey was sitting behind the desk and he drew on a piece of paper, he drew a rat and a fellow with a hand with a knife on it, on this piece of paper and he passed it around to the others and they would laugh about it and they would call me every bastard, every son-of-a-bitching rat double-crosser.
>
> Mr. Perkins said 'I wish it was back like a few years ago,' he said, 'I'd throw you out of this upstairs window.'
>
> And Mr. Hanrahan, he says, 'I ought to beat hell out of you.' And they was real mad.
>
> Now, this lasted until 2:00 in the morning. * * *

> They took me to 11th and State Street, the police station. They locked me up about 2:00 and maybe later. I know it was 2:00.* * * " (1454a-1455a)

The Government has never disputed that it jailed Cupp on a hypocritical gun charge (interstate transportation) on the night of July 16-17, 1967, as his above quoted testimony relates. See also 491a, 522a-523a, 615a-620a, 1407a-1409a, to the effect that the agent who took the gun from him on that day had known for many months that Cupp had a gun.

Cupp ended up spending from August to November 1967 on a second tour at the Cook County jail for violation of parole (the gun charge again); at 631a-656a Cupp described how the Government played cat and mouse with him on the parole revocation brought about by the gun arrest, promising him that they would help lift this parole revocation, telling him from day to day that he was about to regain parole and get out of Cook County jail, but it all came to naught (900a-901a).

Needless to state, Cupp's financial honeymoon terminated, together with his physical liberty, upon his rejailing on the gun charge on July 16, 1967 when he was caught with Pearl and the existence of the secret tapes became known to the Government (Cupp Suppression Hearing, April 4, 1968, Tr. 898-899, 902-903).

All this time no one of the defense people knew what had happened or was happening to Cupp; we did not even know he had been re-jailed or charged with any new offense.

Then, on November 24, 1967 Cupp's wife telephoned defense attorney Evans and told him that Cupp wanted to see him immediately; that the Government knew nothing about her phone call; that "he has tried to get in touch with you

several times by mail, but he isn't receiving any and it can't go out"; and "he thinks the trial is coming up next week and must see you, if possible, this weekend" (Tr. December 1, 1967, pp. 23-36; and see 432a).

Cupp and Mr. Evans conferred several times during December 1967, tape recordings being made of these conferences with Cupp's permission, in which Cupp greatly expanded on his charges against the Government (*infra*).

Meanwhile, also on December 1, 1967, Judge Marovitz denied without a hearing (229a-230a) certain defense motions addressed to the seizure of the defense records on July 16, 1967. These motions were filed in August 1967 (44a-226a), requesting inspection of Grand Jury minutes and a hearing, and dismissal of the indictment for electronic taint and for overall due process taint in the way the Government had obtained the Grand Jury testimony of Cupp, as described by Cupp in the seized tape recordings. Our aforesaid motions of August 1967 did not reach the "poisoned fruit" subject of what happened to Cupp after the Government took him back into custody on July 16, 1967 when they caught him with Pearl, as we had no information on that subject at the time those motions were filed. The Government filed a response to the August 1967 motions denying Cupp's charges of coercion and subornation but recommending that a hearing be held to "clear the air" (6a, 229a-230a fn. 2). In denying the motions without a hearing (December 1, 1967) Judge Marovitz stated (229a-230a):

> "* * * It appears from the papers supplied to this Court, that defendant Cupp may be a Government witness in the case.* * * A motion to dismiss

filed herein by defendant Pearl, alleges certain factual matters tending to discredit the circumstances from which Cupp's apparent decision to cooperate arose. The motion is supported by a voluminous brief and affidavit, and by other papers. In view of the serious allegation that the "total atmosphere" of the case is tainted by violations of the defendant's constitutional rights, the Government has filed a response requesting a hearing prior to trial to "clear the air." However, we believe the allegations made should properly be raised upon cross-examination, if Cupp testifies at trial. We will not entertain the parties' invitation to conduct a pretrial hearing of this matter. It is true that such a hearing could conceivably result in a dismissal of the indictment. However, if the motion were denied after a hearing, the likely possibility exists that defendants would conduct a rehearing at trial upon the cross-examination of Cupp, of the same allegations raised in this motion. If Cupp does not testify at trial, the above reasoning would not apply, and we would entertain a renewal of this motion during the trial, or as part of motion for a judgment of acquittal. But we do not think a hearing at this stage of the proceedings is required or that effective judicial administration would be furthered by holding such a hearing prior to trial. The motion is accordingly denied at this time. It may, of course, be renewed at an appropriate stage of the trial."

Petitioners' contention then was (in December 1967) and continues to be that at that stage, in December 1967, it was incumbent on Judge Marovitz to hold a full eviden-

tiary hearing on the August 1967 motions addressed to the July 16, 1967 seizure of the defense records. For, by not stepping into the situation firmly at that juncture, with Cupp being back under the Government's hand now that he had been caught helping the defense, the District Court was inevitably leaving the Government free to put further renewed pressures on Cupp to force him back into the Government's camp. And that is exactly what happened, Cupp ultimately succumbing to those pressures after a full additional year of futile resistance.

Let us next note how the Government went about ripening and gathering the poisoned fruit after Judge Marovitz refused in December 1967 to hold a hearing on what the Government was doing with and to Cupp since they had caught him helping the defense in July 1967.

On December 18, 1967 Judge Marovitz stated in open court that he was informed Cupp was not going to be a witness for the Government (Tr. December 18, 1967, pp. 14-15.)

Now too, on December 18, 1967, in open court, Cupp uttered a cry for help. He had been beaten up in Cook County Jail (broken arm) and transferred to another Illinois State prison. He now told Judge Marovitz that Assistant United States Attorney Morrissey, an aide of Mr. Hanrahan, "told me that he was going to take me back here, to give orders *to put me back in County Jail and let them finish me off there.*" Judge Marovitz directed that Cupp not be sent back to Cook County Jail (364a-367a).

Mr. Morrissey was present in Court and made no denial or other response to Cupp's above charges of brutal threat;

all Mr. Morrissey said was that the Government did not object to Cupp's staying out of Cook County jail (367a).*

Thus, Cupp after prolonged renewed incarceration at Cook County jail following the arrest-tape seizure happenings of July 16, 1967, had now come back to the defense side and had thereupon uncontradictedly been threatened by a responsible Government official in the most brutal manner.

During the rest of December 1967 and in January and February 1968 Cupp continued consulting with defense attorney Evans. Meanwhile, Cupp now being unavailable to the Government as a trial witness, the Government desultorily served a few subpoenas, etc., supposedly by way of preparing for trial of all of the defendants together on April 1, 1968 (8a-9a).

Suddenly on March 11, 1968 Judge Marovitz ordered Cupp severed from the other defendants and that Cupp's trial begin on April 1, 1968 (9a).** It now became known that in the immediately preceding weeks the Government had been interrogating Cupp without counsel Evans' knowledge (372a-373a, 656a-665a). And Cupp's pretrial motions, for suppression of Cupp's confessions or admissions as involuntary and suppression of unconstitutional electronic evidence, were now rush-scheduled for hearing on March 22, 1968 (10a).

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* Neither Mr. Morrissey nor anyone else of the Government personnel has ever denied the above charges that Cupp made in open Court on December 18, 1967 in Mr. Morrissey's presence.

** The Government has disavowed responsibility for this drastic action of suddenly severing Cupp for separate trial after he rejoined the defense side, but the record refutes this suggestion of the Government (5332a-5335a, 5337a-5340a).

Cupp testified in his separate pre-trial suppression hearing that as late as December 4 or 5, 1967—when Cupp was already consulting with defense attorney Evans—an FBI agent gave Cupp money, evidently in a last ditch effort to win him back again to the Government side; but Judge Marovitz granted the Government's motion to exclude this testimony of Cupp on the ground that "it is not relevant to the period of time" involved in the Cupp suppression motion, the Court saying "I am concerned with what transpired prior to * * * the time of the Grand Jury testimony" (583a-585a). Cupp's Grand Jury testimony was in April 1966. Thus, the separate Cupp suppression hearing was prevented from reaching the issue of the poisoned fruit obtained by the Government out of the July 1967 seizure of defense records and out of the renewal of governmental pressure on Cupp as generated by that seizure. Cupp was permitted, in his separate suppression hearing, to air freely his charges that the Government, prior to his switchover to the defense side in June-July 1967, had coerced and suborned his Grand Jury testimony, had used him as a double agent, for electronic spying on the defense, etc. as noted in other connections *supra.*

Judge Marovitz denied Cupp's separate pre-trial suppression motion, stating, "we simply cannot believe Mr. Cupp" (April 1968, 934a-960a, at 956a); and characterizing Cupp as "a cunning man, formally uneducated, but with a strong capability of grasping at a straw which could help his situation * * * adept at shading his answers, even on cross-examination, so as to cast himself in the best possible light" (956a-957a).

Cupp's separate trial under this indictment followed immediately, with the conviction result and ten year sen-

tence previously noted. Cupp's testimony in his own defense at that trial included much further elaboration on his charges of Government coercion and subornation. See especially 1480a-1495a as to financial inducements of Cupp by the Government; 1036a-1044a, where Cupp spelled out the full horror of his unmerited "boiler room" assignment at Terre Haute, lasting six and a half months, before he agreed to become a Grand Jury witness for the Government; 1100a-1120a, further describing Cupp's ordeals at the Cook County jail; 1407a-1409a, as to Cupp's claim that his gun charge arrest on July 16, 1967 was phony bacause the Government knew all along he had the gun, so that the arrest and rejailing of Cupp on that date were actually a direct product of the Government's learning about the secret Cupp-Pearl tapes which it unconstitutionally seized; 1410a-1430a where Cupp enlarged upon the theme of the voluntariness of his conduct in making the Cupp-Pearl tapes; and especially 1431a-1471a, where Cupp gave his most complete account of how he was threatened and terrorized by the Government people when they caught him with Pearl and seized the tapes on July 16, 1967.

For about six months after Cupp was sentenced to an additional ten years in June 1968 he continued in amicable contact with the defense through regular jail visits and he kept informing the defense of renewed coercions and inducements by the Government to get him to testify against the other defendants. Suddenly, late in January 1969 it was learned that Cupp had been secretly won back over by the Government, and suddenly now also there was a rush to try the co-defendants before Cupp might once more wriggle back out of the Government's grasp.* At that juncture

* Contrast the docket entries of June to December 1968 with those of January 1969 (16a-20a).

the defense still had no facts available for presentation to Judge Marovitz on the "poisoned fruit" question of how the Government had at last got Cupp back on its side. The defense hastened to move for a full evidentiary hearing, for suppression of Cupp's "poisoned fruit" testimony at the forthcoming trial of the other defendants (291a-334a).

Judge Marovitz scheduled hearings on this new defense motion for March 21, 1969. On March 11, 1969, prior to the start of the new suppression hearings, the Court had ruled the July 16, 1967 arrest, search and seizure of Pearl unconstitutional and entered a suppression order (4560a-4564a). The Court's language was, "I will suppress any evidence taken from this defendant as a result of his draft arrest * * * with the exception now of any evidence which Mr. Pearl himself in his court papers made part of the record * * * and that was the tape recordings of Cupp which was submitted as part of a motion here and if you want that suppressed, I will give consideration to that" (4560a-4561a). Counsel then asked the Court whether we would be permitted to go into the subject of "where they seized something which is now deemed wrongful and * * * through what they seized they have got Cupp's testimony" (4562a)—in this last, counsel was of course referring to our "fruit of the poisonous tree" theory that the now (as of March 11, 1969) judicially-declared unconstitutional seizure of the Cupp-Pearl tapes had started a chain of events on July 16, 1967 which enabled the Government unconstitutionally both (1) to thwart the whole defense-legal strategy which had been a defense-legal secret until the Government unconstitutionally seized our secret from us, and (2) to obtain by an unconstitutional series of subsequent coercions the testimony of Cupp as a Government

witness. The Government in the March 11, 1969 proceedings here being described, as well as the Court, understood clearly this "fruit of the poisonous tree" theory which we were asserting, as the prosecutor said, "Mr. Glasser keeps referring to the seizure of these tapes as our ability to induce Cupp back into our camp" (4562a), to which the Court replied, "I understand that * * *. If he has some evidence which will substantiate his theory or philosophy of the law, I am not going to prevent him from attempting to introduce anything to substantiate it. * * * There are a lot of theories in here that may become the law some day" (4563a).

Accordingly, with the above rulings and colloquy of March 11, 1969 on the record, defense counsel took the position, at the commencement of the suppression hearings on March 21, 1969, that since the Court had given us a general order of suppression as to the July 16, 1967 seizure, the Government now had the burden of going forward to establish that nothing in the now judicially-declared unconstitutional seizure of July 16, 1967 had been or would be used by the Government to prosecute our clients, and that this burden of the Government included the burden of negating that (paraphrasing the Prosecutor's words at 4562a) "the seizure of these tapes [gave the Government] ability to induce Cupp back into [the Government's] camp". This burden-of-going-forward argument was rejected by the Court below at the start of the suppression hearings in March 1969 (4601a-4609a), and we were directed to proceed on our own "burden" (*ibid*).*

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* We urge *infra* that this ruling which relieved the Government of the burden of going forward is in itself a ground for certiorari. The Court of Appeals did not refer to this issue.

It was then agreed not to examine Cupp on the suppression issues in the pretrial suppression hearings but to defer such until trial (5149a-5167a). The Court thereupon ruled that all of these pre-trial suppression issues be reserved for decision until the taking of further evidence at the trial (5413a-5414a).

Defense attorney Evans then testified (4619a-4657a) he was familiar with some of the contents of the briefcase unconstitutionally seized from Pearl on July 16, 1967 (4636a), and that the contents were "significant and important to the preparation of the defense * * * an important significance to counsel and the defendants exclusively" (4640a). Mr. Evans and Pearl had had "discussions as to their value to the defense" (4636a), discussions of "a new trial strategy" "based on the tape recorded conversations and telephone recorded conversations that we had recently received from Cupp * * * our decision that our defense would then be based on the new information or on the revelations that had been made to us by Cupp" (4637a).* When asked whether it was "important to the defense that that information remain secret to the defense", Mr. Evans responded that "any preliminary preparation is extremely important to the defense of the case" (4638a); and when asked whether "the contents of [Pearl's] briefcase on that day and the contents of those tapes which were in [the] briefcase were the common property of the defense", Mr. Evans replied, "yes, the entire defense counsel and in the interests of the defendants, yes" (4638a). Mr. Evans also testified that to his knowledge Cupp had

* In several instances Mr. Evans' testimony which we are here quoting was in the form of "yes" answers to questions embodying above quoted items.

initiated his secret contacts with the defense which led to the Cupp-Pearl tapes (4627a-4629a).

Petitioner Pearl testified in the suppression hearings of March 1969, describing the contents of his seized briefcase on July 16, 1967, which included several secret Cupp tapes additional to the one whose transcription was contained in the defense motions of August-September 1967 (4664a-4673a). Pearl's briefcase also contained "a great deal of * * * investigative material and defense material upon which we wanted to question Mr. Cupp at our July 16 meetings" (4673a). "* * * The contents of that briefcase contained everything that the defense had done up to that time. Everything that the defense hoped to achieve up to that time was contained either in the tapes or in the files that were in that briefcase" (4677a). "* * * Another file contained a list of defense witnesses, and a questionnaire that had been prepared for further questions that we wanted to ask Cupp. Another file contained in summary form the theory of the Government's case as we knew it, as our investigation had produced it" (4693a). See also Pearl's further description of the important contents of the files, at 4706a-4707a.

Pearl also testified as to his attorney-client arrangements with Mr. Evans for that day with reference to the secret defense-legal contents of the briefcase (4674a-4675a).

See especially Pearl's testimony as to what the defense strategy had been in connection with the secret tapes and how that defense strategy was thwarted by the unconstitutional seizure (4740a-4746a):

By Mr. Glasser:

Q. Now, Mr. Pearl, you were, at that time, you testified the last time, at the time of the seizure of your briefcase, the arrest, the whole occurrence of July 16, 1967, you and counsel were embarked upon a certain course of activity in regard to obtaining information from Cupp and you remember testifying that on that day the specific intention was to have the Cupp tapes transcribed and authenticated by a notary public? A. That is correct.

Q. And that was prevented by the seizure of your briefcase? A. It was prevented partly by the seizure of my briefcase and partly by not being able to contact Cupp any further.

Q. All right. Remember now that you have said that there was a plan that was being carried out by yourself and counsel? A. Yes.

Q. If the authentication had gone through that day, if the transcribing and authenticating of the Cupp tapes had gone through that day, what further did the plan entail, the plan of yourself and counsel?

* * * * *

By the Witness:

A. Well, we intended to pursue the investigation based on what Cupp had told us previously and questions we were going to ask Mr. Cupp on July 16, and then we were going to make a, try to corroborate everything that Mr. Cupp had said, to check out all of his statements and to corroborate everything he had said or disprove whatever he had said. We wanted to find out whether Mr. Cupp was telling the truth.

Q. Was there to be any assistance in that corroborating endeavor from Mr. Cupp himself? A. Yes, there was.

Q. Will you briefly tell the Court what that was. A. Well, we would continue questioning Mr. Cupp and in the meantime, in the interim period, Mr. Cupp, the government was still under the impression that Mr. Cupp was with them and we had hoped that Mr. Cupp would be able to get us uncontrovertible proof of his association with the government, he had told us was—

Q. Of his association? A. Of what he had told us was his illegal association with the government.

Q. His illegal association? A. That is right.

Q. You mean according to him? A. According to him, right.

Q. Now upon the completion of that checking out, that planned but never completed checking out and corroboration, what then did the plan entail that should be done? A. The plan entailed either making a complete disclosure to the court or asking for an immediate trial or both.

Q. And that was the step that was planned? A. Or making a motion, I beg your pardon, using it as a basis of the motion to dismiss.

Q. At what stage were you contemplating making full disclosure to the court?

* * * * *

A. As soon as we had completed our investigation.

* * * * *

By Mr. Glasser:

Q. Was it or was it not definite that a disclosure would be made to the Court at the time of the completion of the investigation and the corroborating efforts? A. It was our definite plan to make a disclosure as soon as the investigation had been complete. The only thing we were uncertain about was just exactly how we would do it, whether we would do it by motion procedure or whether we would do

it by informing the court of what had happened. But we did intend, we had the intention to make a disclosure as soon as our investigation was completed, and we also had an alternative plan whereby it was considered whether we should allow Mr. Cupp to continue, if the government had not found out Mr. Cupp was their witness, to continue as before and until we got absolute proof of the—

Q. How was that an alternative plan? You mean under that alternative, the Court would not be informed? A. Well, we anticipated that Cupp might not be able to get, that he might not be able to get the absolute proof that we wanted, that the statements that he alleged that the government had made to him and the offers of reward, and so on and so forth, we might not be able to get that before trial, in which case our investigation would not have been completed."

Pearl was also asked (on direct examination by his own counsel) whether Cupp ever asked him for money in connection with the secret tapes, and he answered that before any tapes were made (4748a) Cupp asked him to get Cupp money from "various organizations", "from the unions", "to help him get legal defense", "some money for him to keep going and for him to get an attorney, and I told him that I could not" (4746a-4750a).

Decision being reserved (*supra*) as to the foregoing pre-trial suppression issues—and the Court denying companion pre-trial defense motions to prevent Cupp from testifying on credibility grounds as a matter of law under the standard of reasonable doubt (5147a-5148a)—the Court permitted Cupp to testify as a Government witness in this trial.*

* The upshot of all the motions was that Cupp's trial testimony remained in the record intact—no suppression, no striking of any of the testimony.

Cupp's trial testimony on the indictment charges—summarized in the opinion of the Court below, Appendix hereto, *infra*, pp. A2-A4—described how, based around Detroit and at the direction of Tanner and Pearl, Cupp with Price and Chipman obtained stores of dynamite in Tennessee, and how Cupp set explosives on railroad tracks and near the vessel Shaw in Calumet Harbor, Chicago, causing property damage.*

The sole direct evidence for the prosecution in this trial that the *defendants* did the acts charged in the indictment was the testimony of Cupp. The Government did introduce much evidence from other witnesses plus miscellaneous business records, which the Government offered as "corroboration" of Cupp. All of this "corroboration" fell into two categories: (1) Proofs that a defendant spent money, performed travel, or was present at or near a time or place, arguably material to happenings charged in the indictment (i.e., circumstantial evidence);** and (2) proofs that defendant Pearl made statements to persons other than Cupp which arguably could support an inference that Pearl was or might be capable of doing or intending the acts, charged in the indictment.

In Cupp's trial cross-examination more light was shed on the constitutional issues of suppression and credibility. For example: (1) At one point, after having heard Cupp's

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* That the explosives were set near the vessel Shaw—not "in or upon" the vessel, within the meaning of 80 U.S.C. § 2275—is the basis of our Question presented No. 10 (p. 5, *supra*) challenging federal jurisdiction of the subject matter of Count 7 of the indictment. Question 10 is preserved in the event of the granting of certiorari.

** All such money, travel and time-place proofs relating to Tanner and Pearl were consistent with their respective lawful labor strike activities.

testimony on direct examination plus some hundreds of pages of the cross-examination, the Trial Judge exclaimed at side bar, "You just have a witness who has admittedly given false testimony on a number of occasions and who has so little regard to what he had to say under oath * * *" (2512a). Thus:—(2) At 2479a-2494a, 2498a-2528a Cupp flatly recanted his testimony at his own separate trial that he and the co-defendants were innocent of these indictment charges, and that the Government had coerced him and financially induced him to testify before the Grand Jury, Cupp repeatedly saying "none of it was true". (3) As to the "poisoned fruit" significance and the *per se* coercive impact of Cupp's rejailing on July 16, 1967 and the aftermath jail pressures: See *passim* especially the Cupp cross examination in this trial at 2845a-2950a. (4) As to Cupp's self-admitted amazing ability to "make up" elaborate lies, all by himself, with comparatively little "preparation", and even on the spur of the moment while sitting on a witness stand under oath in a court:—At 2833a-2837a, defense counsel Evans read to Cupp an entire lengthy conversation of Cupp with Government officers, which Cupp had related to Mr. Evans on tape, about the entrapment plot between Cupp and the Government to trick high union officials into bribing Cupp, this same elaborate story having been told by Cupp also in his separate trial, and now in this trial Cupp blithely told Mr. Evans, "I said those words. I made these up along with a lot of other things I have made up". At 2419a-2422a Cupp told defense counsel Finn that his entire testimony at his separate trial describing the fury and the threats visited upon him by the agents and the prosecutive personnel on July 16, 1967 as

they were listening to the unconstitutionally seized tapes, the highly detailed testimony in which Cupp had described people drawing pictures of a rat with a dagger in his back and other people threatening to throw him out the window, etc.—Cupp now told Mr. Finn that "I made that statement up" (2421a). At 2374a-2375a, as defense counsel Finn had been questioning Cupp about his prior testimony of being offered $20,000 in reward money by Messrs. Hanrahan and Morrissey, and as Mr. Finn at 2374a read to Cupp an exact script from Cupp's prior testimony of the alleged conversations between Cupp and Hanrahan, Cupp said to Mr. Finn, with flabbergasting insolence, "I could continue that in the transcript if you like, the conversation" (2375a). A few moments later Cupp again taunted Mr. Finn with a similar example of this sort of scoundrelly braggadoccio—"I put in a lot of things at *that* trial" (emphasis supplied).

[Concerning this "witness" who thus boasts of having *totally* lied in "*that*" (prior) trial, how can any mind or power under Heaven assure that in *this* trial it was constitutionally safe and proper for the Court to entrust a lay jury with the task of testing Cupp's testimony under the standard of reasonable doubt?]

Another example of Cupp's self-admitted character as a phenomenal liar: At 2490a, 2493a, and 2514a-2515a, Cupp was being asked by the cross-examiner about his prior testimony that the agents had tried to demoralize him by implying that his wife was being or would be unfaithful to him during his prolonged imprisonment, the agents dangling before him the reward of early parole if he "cooperated"; also Cupp was here being asked by the cross-examiner about his related prior testimony that his wife

told him she feared their children would be taken away from her, impliedly because of this same suggestedly (by the agents) alleged immorality of the wife during Cupp's imprisonment. At the pages in this trial just cited, Cupp denied his prior sworn testimony that the agents or his wife had spoken to him in this vein at all, "none of it was true". [Even if Cupp was *telling the truth* in this trial, that he himself had concocted and sworn to such repellent actions of the agents in trying to demoralize Cupp by impugning his wife's virtue and threatening to take away the children, then we must conclude that Cupp himself is a liar of such monstrousness that he would even make up lies that expose to vile scandal his own wife and children.]

All of the foregoing examples of Cupp's self-admitted unlimited ability and unlimited willingness to make up elaborate lies and swear to them in Court, pale into relative insignificance when compared with the example now to be given: Cupp in this trial had told defense counsel on voir dire that between the time of his sentencing at his own separate trial, June 1968, and the time of his final switch-over back to the Government's side in January 1969, he had had no interview, correspondence or other contact with the Government except meetings on November 20 and 21, 1968, and that no notes had been taken down in writing during these meetings (2180a-2185a). This voir dire testimony of Cupp preceded any of his defense cross-examination. The defense knew that between June 1968 and December 1968 Cupp had been regularly visited in jail by our investigator, John G. Broady, and that Cupp had related to Broady *in great detail* during the two last of those visits (December 1968) that the Government had interviewed him again coercively in November 1968 to try to force him back into being a prose-

cution witness (*infra*). We therefore knew what to expect from Cupp when the time came around to cross-examine him about these latter detailed statements of his to Broady at the prison. We knew he would either deny having made the statements or would say he had "made them up"; we knew he would give the Government people a clean bill of health, i.e. that they had not coerced him in the November 1968 interviews which Cupp had told Broady were extremely coercive. Accordingly the defense cross-examination of Cupp on this phase was directed to drawing out Cupp on his technique of deceit in this important instance. This portion of the cross-examination began by our inviting Cupp to explain how he had made up his prior testimony of the scene on July 16, 1967 when the Government people were listening to the Cupp-Pearl tapes:

> Q. All that later testimony that you gave and later statements that you made about somebody drawing a picture of a rat with a dagger sticking in it, somebody threatening to throw you out of the window, people cursing at you, one man saying he wished it was some years back before the constitutional laws had been changed so that they could really throw you out of the window, all that which you later told, you made it up? A. Yes, sir. I made it up in my defense for my trial. (2880a)
>
> * * * * *
>
> Q. But you still haven't answered my question of how long it took you to package up this particular lie —minutes, hours, days? A. No. It would take minutes.
>
> * * * * *
>
> Q. Sometimes, however, could there be a situation where you could do it in just a few seconds? A. I think so. (2882a-2886a)

Then the cross-examiner asked Cupp about the visits by the Government people at the jail after Cupp's conviction in 1968. Cupp answered, describing interviews which he said were entirely "friendly", and in which Cupp told the Government people he would let them know later about becoming a Government witness again (2929a-2934a). Thereupon the cross-examiner asked Cupp whether he had given the defense investigator Broady a quite different account of his interviews with the Government people:

> Q. * * * Did you tell Mr. Broady substantially that? A. Yes, I did, which was false.
>
> Q. All of it, every word of it in there is false? A. Just about, Mr. Glasser. * * * (2940a-2941a)
>
> * * * * *
>
> Q. You mean you made up a whole visit this time, you had a whole cast of characters here and you had a whole script here that runs about five or six pages, more than that? (2947a)
>
> * * * * *
>
> The Court: How long did you visit with Broady on that occasion?
>
> The Witness: I believe 45 minutes, your Honor.
>
> *By Mr. Glasser*:
>
> Q. All right. You made up a script, a whole script of a cast of characters of four people, yourself, Mr. Casey, Mr. Morrissey and Mr. Meyers, and you put exact sentences in the mouths of all of them. You spun a whole yarn here, didn't you? * * *
>
> Q. We will hold that a minute. Is this the first time that you had a script made up of completely lies, containing as many as four characters, a cast of four characters? A. I believe so, Mr. Glasser.

Q. You have never made up lies involving four characters before? (2948a-2949a)

* * * * *

A. I may have, during my trial.

By Mr. Glasser:

Q. Ah. For example, these four other defendants in this case, are they a cast of characters around whom you have spun a whole drama of lies? A. No, sir. They were not lies, what I testified against the other defendants.

Q. But you are capable of creating a whole imaginary drama of lies involving four characters, aren't you? You are capable of it? A. Capable?

Q. Did you do it here? A. Yes, sir, I did do it there. (2949a)

(5) Possibly Cupp's most impressive exercise of his wonderful abilities of mendacious invention and extrapolation in this trial was achieved in his cross-examination testimony about how many different times so many different people on the defense side had prevailed upon him corruptly to sully his veracity. Cupp's most aggrieving testimony along these lines was in his efforts to disgrace his own former defense attorneys in the eyes of the jury. At 2222a-2223a Cupp equivocally tried to disavow letters which he had undisputedly written in December 1967 imploring Mr. Evans to assist him. This was but a precursor of what was to come. At 2472a Cupp gave the lie to the statement of his former attorney Mr. Butler that Cupp had invariably assured Mr. Butler of Cupp's innocence of blowing up the vessel Shaw. At 2538a Cupp practically in so many words

accused Mr. Butler of having him lie under oath about the fracturing of Cupp's hand at Cook County jail in 1967;* when at 2714a Mr. Butler read to Cupp the words Cupp had spoken to Judge Marovitz on December 18, 1967—which was nearly four months before Mr. Butler had any contact with Cupp in this case—declaring that his hand was broken in a fight at Cook County jail, Cupp quietly admitted the statement, evidently forgetting that only a little earlier that same day he had so recklessly accused Mr. Butler concerning this. At 2570a Cupp again implied that his own attorney had coached him to give false testimony. At 2655a-2669a, 2674a, 2678a, Cupp turned on Pearl as having suborned him in the making of the secret tapes of June-July 1967, and Cupp said that at that time he proposed to the defense (*via* Pearl) "That if you give me enough money when your trial comes up I won't testify against you" (2667a). At 2732a-2733a Cupp again implied that Mr. Butler had suborned him in connection with Cupp's former accusations against the Government in regard to electronic monitoring. At 2734a, 2739a, 2745a, 2750a-2751a, 2876a, Cupp again impugned the Cupp-Pearl tapes as having been pre-rehearsed on promises of money. At 2743a he again impugned his former attorneys as having impliedly suborned him. Cupp's most explicit imputations of subornation against his former attorney Mr. Evans in regard to the making of the Cupp-Evans

* This imputation by Cupp that Mr. Butler suborned him in regard to the broken-hand incident is dumbfounding. Mr. Butler did not enter this case as Cupp's attorney or have any contact with him in this case until April 1968. We have seen that in December 1967 Cupp had told Judge Marovitz in open Court how his hand was broken. And on the Cupp-Evans tapes made in December 1967, Cupp had told Mr. Evans the same thing.

tapes in December 1967-January 1968 appear at 2758a-2766a, 2777a-2787a, 2807a-2844a. At 2786a Mr. Evans exclaimed "Let's play the tapes" (unfortunately the Cupp-Evans tapes were never played in this trial—see *infra*). See also the entire cross-examination of Cupp by Pearl's counsel Mr. Glasser at 2845a-2950a, *passim*, where Cupp repeatedly impugned the bona fides of the tapes and kept insisting that all his overtures towards the defense camp were to get money for letting himself be suborned.*

We pause in this recital of Cupp's accusations of defense subornation, to note that at 2893a-2894a Cupp was confronted with a "3500" statement of his that prior to the main Cupp-Pearl tape of July 2, 1967 "there was no extended discussion between himself and Pearl as to what Cupp was to say".**

At 3134a-3159a Cupp went so far as to drag into the indiscriminate scene of his corruption charges against the defense side, his own old Marquette-parole attorney of

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* Mr. Glasser may be the only one of the numerous defense attorneys who have had direct personal contact with Cupp, whom he has not accused. Cupp has accused (*supra* and *infra*) attorneys Evans, Butler, Finn, Mann, Miller and Louisell, as well as defense investigator Broady, and defendants Pearl and Tanner. He has also accused, apparently, literally everyone with whom he has ever had contact on the prosecution side.

** Incidentally, this last quoted "3500" item goes on to state, "But it was silently understood between them that Cupp's statements must be favorable to Pearl and the other defendants if the recordings were to accomplish their purpose" (2894a). This plainly indicates that the Government took written statements from Cupp after the July 16, 1967 seizure of the tapes, and that a purpose of these statements was to prepare prosecutive ammunition for this case in regard to those unconstitutionally seized tapes. Could there be a clearer indication that the Government had literally "used" "fruit of the poisonous tree" of July 16, 1967 in preparing this prosecution on the basis of the "primary illegality" and "primary taint" within the meaning of the *Wong Sun* case discussed *infra*?

1965-1966, Mr. Mann, Cupp in effect here accusing Mr. Mann of having obtained Cupp's parole by improper inducements upon members of the Parole Board of the Department of Justice in Washington. In similar vein, 3178a-3180a, 3214a, Cupp accused all three of his Marquette attorneys, Messrs. Miller, Louisell and Butler of suborning him in that case.

It appears that Alvin Junior Cupp—who has sworn that among the people who have suborned him at one time or another are not less than six defense attorneys, the Federal Parole Board in Washington, the former United States Attorney of the Northern District of Illinois, three of his assistants, unnumbered FBI agents and prison officials, not to mention co-defendants herein, Union people and defense investigators—"rapes awful easy".

For record-citational completeness, see also 2391a-2393a, 2428a-2430a, 2608a, 2638a-2650a, 3209a-3211a, where Cupp gave additional testimony about alleged activities of defense people or Union people promising him money to give false testimony. And, at 3218a see Cupp's cry "I have never got anything out of any of it". For sheer, breathtaking rascally frankness, it would be hard to match Cupp's response when the cross-examiner asked him at 3201a what he would have done if he "had gotten this money from people you claim offered it to you". Cupp's answer was "* * * if they fulfilled their promise * * * I would probably remain silent just like I did in the past, if they would have did what they told me they would do. * * * I just wouldn't have come forward". In other words, Cupp, by his own proclamation, is for sale—for a money price—or for a physical-freedom price.

Reasons for Granting the Writ

1. This federal prosecution in a District which is currently notorious for prosecutive intemperateness during the incumbency of the United States Attorney under whom this case was started and developed for trial utilizing the "testimony" of Alvin Junior Cupp, is a disgrace to federal criminal justice. If the supervisory power is not exercised in such a case, there is no "supervisory power" to assure decency in the administration of federal criminal justice.

This "decency" issue is not whether a jury could reasonably believe that Alvin Junior Cupp told the truth in this trial. The "decency" issue, the decency *duty* at both prosecutive and judicial levels, was and is the duty to refrain from letting such a case go before a trial jury at all.

At this certiorari stage, as in the appeal stage below, it was and is too late, it was too late when this trial began, to undertake a judicial search for the at-last "really true truth" that may lurk somewhere inside the strange mind of Alvin Junior Cupp.

The Court of Appeals reasoned that our above argument amounts to a charge that the Government suborned perjury in this case, which the Court found untenable as having been resolved against us by the jury. But it is not essential at all, it never has been essential, to our argument of constitutional taint or to our plea for exercise of the supervisory power, that the Courts below or this Court must brand the Government as a suborner of perjury. What we are arguing is that the Government's dealings with Cupp (both before and after the unconstitutional seizure of the secret defense records), and Cupp's constitutionally insufferable character as a "witness", have so tainted the Gov-

ernment's case in the constitutional sense as to make Cupp's trial testimony herein inadmissible whether that testimony be thought to be true or not, or suborned or not by the Government. Or, if Cupp's testimony was provisionally "admissible" in the procedural sense, a conviction based on that testimony cannot constitutionally stand.

The *undisputed* facts are that the Government unwarrantedly subjected Cupp to the torture of solitary confinement, unwarrantedly "busted" him in a prison boiler room, gave him brief illusory respite on the prison honor farm, clapped him then into the dungeon horrors of Cook County jail, feasted and cuddled him then after he gave Grand Jury testimony, starved and dungeoned him again then after they illegally seized the secret defense records, threatened to "finish him off" then when he drifted back to the defense, pounced on him then for severed trial, secured a crushingly lengthy sentence against him, and then at last got him back as their witness. The *undisputed* facts that the Government did all of these things to and with Cupp have nothing necessarily at all to do with the question of whether Cupp's ultimate testimony for the Government was obtained by subornation. The question is whether a constitutionally decent and fastidious Court system for the trial of public crimes can tolerate letting juries listen at all to the gyrational testimony of a man like Alvin Junior Cupp after he has gone through the *undisputed* pattern of alternate inflictions and inducements by the prosecutive officials as the record demonstrates in this case.

Irrespective of whether one thinks Cupp told the truth or that the Government suborned him, this case puts a worse blot on the dignity and honor of the United States

Government than the blot which this Court erased in *Mesarosh* v. *United States*, 352 U.S. 1, 9.

2. Further as to the unconstitutional seizure of the secret defense records containing the Cupp tapes:—This seizure did two things, it produced the "poisoned fruit" of Cupp's trial testimony in this case, and it invaded the constitutionally protected defense-legal secrecy and privilege based on the secret Cupp tapes, in violation of due process, right of counsel and right to be free of unreasonable search and seizure.

As to the "poisoned fruit" branch of our argument, we rely on *Wong Sun* v. *United States*, 371 U.S. 471, 487-488, and *United States* v. *Edmons*, 432 F. 2d 577 (C.A. 2, 1970). In *Wong Sun*, the test for determining what is "fruit of the poisonous tree" was stated as being "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." In responding to our argument based on the *Wong Sun* and *Edmons* cases, the Court below gave two answers, namely, that our "poisoned fruit" argument is really a subornation rather than a constitutional argument (which we already have discussed above), and that the connection between the Government's unconstitutional seizure of our secret records and the Government's ultimate obtaining of Cupp's testimony is "tenuous". What is "tenuous" about the unremitting and cruelly varied pressures which the Government applied upon Cupp's helpless being from the time they rejailed him in July 1967 until they finally broke him around the end of 1968? We urge the Court to examine the opinion in *Ed-*

mons, supra, on this supposed issue of "tenuousness". The *Edmons** language, " * * * * that the greater the Fourth Amendment outrage the greater should be the judicially consequent deterrent sanction against the police * * * *", is applicable to our case. True, it took the Government in our case nearly two years and a Florentine series of devious and inhumane maneuvers to pluck the poisoned fruit of Cupp's 1969 trial testimony from the poisonous tree of the unconstitutional arrest-search-seizure of July 16, 1967. It is not the remoteness or the attenuation of the Government's over-all conduct, in such a scene, that should be emphasized; what should be emphasized is the *persistence* of the Government, its relentlessness, its fierceness and its implacability, in pursuing its unconstitutional effort to win the poisoned fruit over such a long period of time and through so many twists and turns.

As to the branch of our argument relating to the invasion of defense secrecy, the Court below disposed of this in a footnote (appendix hereto *infra*, p. A7), saying it is unnecessary to consider "at what point disclosures of the defendants' case taint the entire prosecution since we find that the Government was not materially surprised by the discovery of the tapes," citing *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 392.

We are not sure what the Court below meant by "materially surprised by the discovery". This could mean either that the Government was not surprised because it had some knowledge of the discovered contents beforehand, or that the Government was not surprised because it later got

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* *Edmons, supra,* was incidentally also a phony "draft card" case, "unprecedented"—*except for this very case of ours.*

equivalent information in whole or in part from some independent source free of the Fourth Amendment taint of the seizure of Pearl's briefcase. The Court's citation of the *Silverthorne* case is explicable, in view of the *Silverthorne* facts, only on the latter theory. But, we shall discuss both theories.

If the Court means that the Government was not materially surprised because it knew something about the tapes or their contents or import before it illegally seized the tapes, we submit: In view of Judge Marovitz's ruling that the seizure was illegal, *it was the Government's burden* to prove its "beforehand" knowledge if the Government is to be condoned in its use of the illegally seized knowledge of the secret defense strategy on some theory that the Government "was not materially surprised" by discovering these defense strategy items in the illegally seized tapes. Of course the Government never met that burden, never even tried to meet that burden, and never presumed to suggest the contrary until its disingenuous suggestion in its brief in the Court below (pp. 30, 34-35) that during the fast-moving minutes that Cupp was with the FBI agents in their car or at their office in Chicago on the day of the illegal Pearl arrest, and prior to the actual seizure, Cupp revealed to the agents the existence of the tapes and thereby supposedly the Government "knew the general nature of the contents of the tape [sic] prior to the time it played them" (id. p. 34). See the Government's strained language in its footnote 76 on page 35 of its aforesaid brief where, after floundering to salvage the situation, the Government offers to submit to a hearing "to establish the extent of the Government's knowledge of the content of the tapes prior to the seizure". This can only mean that the Government is claiming that Cupp

gave them some kind of fast outpouring as to the contents of the tapes in the very short time between the seizure and the playing, but this is all but incredible because there has never been any slightest suggestion in this record by Cupp or by any Government person, that any such thing occurred.

In view of the fact that the Court below declared that "we *find* that the Government was not materially surprised by the discovery of the tapes" (emphasis supplied), we asked the Court below in our petition for rehearing what is the basis of such *finding* by the Court, in view of the fact that the record is bare of any facts to support such finding, and that the Government itself so recognizes as evidenced by its lame offer to have a hearing on the subject. We urged in our petition for rehearing below that, on an issue so vital to the decision of these appeals, the Court below would surely wish to reconsider its *finding* above described. Rehearing was denied without opinion.

We noted above that the *finding* of the Court below that the Government "was not materially surprised by the discovery of the tapes" is susceptible of a second meaning, that the Government, *post-seizure*, got the relevant knowledge (of the contents of the tapes) through an "independent source" free of the Fourth Amendment taint of the illegal seizure, within the meaning of the *Silverthorne* case which the Court cited. Nothing in *Silverthorne* explains the Court's having cited it except the idea of a post-illegal seizure "independent source". But the only "independent source" in our case, so far as we can see, would have had to be Cupp himself. But this thrusts the case right back into that very "poisoned fruit" Fourth Amendment framework. For if the Government got "independent source"

knowledge of the contents of the illegally seized tapes from Cupp *after the illegal seizure*, then the Government must have got such post-seizure revelations from Cupp *because of the illegal seizure.*

Further in connection with the Fourth Amendment question as to the seizure of the tapes, the Court below remarked at A7, *infra*, that the tapes were exculpatory and that it was we who sought to introduce them in their entirety. This overlooks that we had originally sought to use these tapes while our constitutionally protected defense-legal strategy was still secret as against any illegal seizure by the Government; and it overlooks that in our motions before Judge Marovitz in the autumn of 1967 which came after the illegal seizure of the tapes, we asked for a full evidentiary hearing *at that juncture* as to the illegality of the seizure and the consequences thereof both as to the thwarting of our secret defense strategy and as to the Government's renewed pressure against Cupp to coerce him into testifying against the defendants; and that Judge Marovitz refused to hold a hearing at that juncture, thereby enabling the Government to go on using and developing the fruits of the illegal seizure.

The Court below also incorrectly states (see A7, *infra*) that we do not argue "that the Government gleaned any investigative leads from the tapes that resulted in uncovering other incriminating evidence". See p. 35, *supra*, n.

3. In this extraordinary testimonial scene, where an Alvin Junior Cupp was regaling a Federal Jury with melodramatic charges against the defendants and their lawyers as being the authors of corruptly fabricated tape recordings using Cupp's Trilby voice to perpetrate their evil deeds, a sense of due process and of the principles of fair judicial

trial should have prevailed to permit the defendants the opportunity of countering these statements of Cupp by playing before the Jury the allegedly counterfeit tapes.*

So copious were the colloquy proceedings below on this question of the playing of the Cupp tapes, that we think it would take the total pages of this petition thus far to describe and discuss appropriately those items in this record. The entirety of the colloquy proceedings in question on this subject appear at 2239a-2281a, 2321a-2325a, 2388a, 2704a-2709a, 3757a-3771a, 3979a *et seq.*, 4030a *et seq.*, 4070a-4072a, 4121a-4124a, 4173a-4180a, 4232a, 4240a, 4244a-4255a, 4266a.

If a prosecution witness who has given tape recordings to the defense branding the prosecution of the entire case and his own prior Grand Jury testimony as being false, now says that those tapes were pre-arranged, scripted, rehearsed and fed to him by defense representatives on promises of money payments, and where the defense in such trial implores the Court to let the jurors listen to the tapes to test the verisimilitude of the tapes and the plausibility of the charges of subornation and faking, the Court should not only *permit* the playing of the tapes to the jury, but should *insist* on it.

Once the issues of suppression were decided by the Court below in favor of allowing the Government to use Cupp as a trial witness, the decisive issue at the trial became, for both sides, whether the jury would believe Cupp. In this the prosecution's problem was how to get a jury to believe Cupp beyond a reasonable doubt in the face of Cupp's admitted history of fantastic lying and of multiple switch of alle-

* One tape was played for a few minutes only and was stopped by the Court.

giances. For the Government the perfect solution to this problem was to tell the jurors that all of this lying and switching of allegiance were not really Cupp's doings at all, it was all the fault of the crooked defendants and unions who had corrupted Cupp into lying for them, and now at last Cupp was telling the truth again and was exposing not only the defendants' crimes under this indictment but also their corrupt acts in seducing Cupp to commit all that prior perjury of his on behalf of the defense.

Were we not entitled, then, to a full judicial hearing on these charges of having corrupted Cupp? If we are accused of coaching, rehearsing, suborning Cupp on the tapes, how can that accusation be fairly judged without listening to how the allegedly coached and rehearsed dummy actually sounds on the tapes? Does he sound like a person reciting a rehearsed script? Do his inflections and his speech delivery sound artificial, suspicious in some way, or do they sound natural? Above all, how does the content of his words come across to the listener, do the sentences sound pre-prepared, does any of the spoken material sound pre-prepared, or does it sound extemporaneous and convincing as the authentic ordinary speech of this person himself? Does his spoken content on the tapes sound as though he is saying things that he knows about himself, or does it sound as though he is just repeating something someone else told him to say?

If there did remain any theoretical chance of its occuring independently to the jurors' own minds that there might be something unjust in asking them to conclude that the tapes were fake without letting them listen to the tapes, this slim chance was destroyed when the Court in the pres-

ence of the jury at 4002a-4011a, engaged in lengthy colloquy with counsel in which the Court repeatedly expressed its strong belief that it would be wrong and unnecessary to play the tapes for the jury. Thus in effect, these jurors were not only told they could believe Cupp's charges that we faked the tapes and that they (the jurors) could come to this conclusion even though they did not know how the tapes sounded, they were also told by the Court that indeed it would be improper for them to hear what the tapes sound like.

It should be remembered that Cupp was totally uncorroborated on this whole question of the defendants' or the unions' having suborned him on the tapes or anywhere else. Not only was Cupp uncorroborated, he was strongly contradicted. Defense witness Longo, a retired FBI agent, testified that he was present when Cupp stated to defense attorney Finn and defendant Rice that Cupp wanted to give them "some information" and "would expect to be paid for this information", Cupp "wanted to exchange his testimony for money", Cupp said "I am shaking you down" (4082a). In the face of such testimony, that it was Cupp who was trying to shake down the defendants rather than we who were trying to suborn him, did not an even greater necessity arise to check out how Cupp really sounds on these tapes?

The Court below completely overlooked the real meaning of our point as to the non-playing of the tapes. The opinion below reductively treats our request for the playing of the tapes as having been merely for the purpose of impeaching the truthfulness of Cupp's statements on the tapes (pp. A9, A10 *infra*).

CONCLUSION

It is respectfully submitted that this joint petition for a writ of certiorari should be granted.

Respectfully submitted,

ABRAHAM GLASSER
Attorney for Petitioners
Joseph Alfred Tanner and
Jack Alter Pearl

OPINION OF
THE COURT OF APPEALS
SOUGHT TO BE REVIEWED

In the
United States Court of Appeals
For the Seventh Circuit

SEPTEMBER TERM, 1971 SEPTEMBER SESSION, 1971

Nos. 17917, 17918, 17919

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSEPH ALFRED TANNER, JACK ALTER PEARL, WALTER BERYL CHIPMAN, and LAWRENCE HENRY RICE,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 67 CR 30

ABRAHAM L. MAROVITZ, *Judge.*

MARCH 3, 1972

Before SWYGERT, *Chief Judge,* FAIRCHILD and PELL, *Circuit Judges.*

SWYGERT, *Chief Judge.* This appeal challenges appellants' convictions for substantive offenses under 18 U.S.C. §§ 837, 1363, 2275 and for conspiracy under 18 U.S.C. § 371. The indictments of Joseph A. Tanner, Jack A. Pearl, Lawrence H. Rice, and Walter B. Chipman arose out of the bombing of the *S.S. Howard L. Shaw* in the Calumet Harbor, Chicago, the bombing of a transformer at the site of a grain elevator terminal in Ohio, and a series of bombings of railroad tracks in Ohio owned by the

Wabash Railroad and the New York Central Railroad. All four appellants were convicted under Count I of conspiring to perform the above acts and under Count III of transporting explosives in interstate commerce (in violation of 18 U.S.C. § 837). Tanner and Pearl alone were found guilty of Count IV which alleged they had willfully and maliciously destroyed a structure, a dock at Calumet Harbor, and a vessel, the *S.S. Howard L. Shaw*, within the special admiralty and territorial jurisdiction of the United States (in violation of 18 U.S.C. § 1363), and Count VII which alleged they had knowingly and unlawfully set fire to a vessel of foreign registry within the jurisdiction of the United States (in violation of 18 U.S.C. § 2275).[1] Tanner and Pearl were sentenced to five years on Counts I, IV and VII and one year on Count III (the sentences on all counts to run concurrently). Rice received a six-month sentence and Chipman a year sentence on Count III. Chipman and Rice also received suspended sentences under Count I with five years' probation to begin upon the expiration of the sentences assessed under Count III.

The pivotal witness against appellants was Alvin Junior Cupp, a codefendant originally charged under the same indictment,[2] but whose trial was severed from and held prior to that of the remaining four. Cupp's testimony, which we briefly summarize, related events occurring between May 1963 and September 1963. Tanner, the vice president of the Seafarer's International Union (S.I.U.), and Pearl, his lieutenant, were cast as the instigators of a program of violence and intimidation, in which Rice, Chipman, and Cupp participated, directed against several companies with which the union was in dispute.

The conspiracy was allegedly formed in late April or early May 1963 at a meeting near Detroit attended by

[1] The original indictment charged the defendants with seven counts. Counts II and V were dismissed on the motion of the Government prior to trial. Count VI was dismissed by the trial court for violation of the ex post facto clause of the Constitution.

[2] Cupp was found guilty on Counts I, III and IV and was given a ten-year sentence (subsequently reduced to one year) to run concurrently with a five-year sentence imposed for another offense.

Pearl, Chipman, Rice, and Don Swait (a Canadian S.I.U. official who is an unindicted coconspirator). Tanner did not attend because of prior engagements, but was said to have ordered the meeting convened. According to Cupp's account, the purpose of the meeting was to arrange for Pearl and Cupp to relieve Chipman and Rice of their responsibilities for "the rough stuff on the Great Lakes."

On June 13, 1963 the first trip to obtain explosives was organized during a meeting of Chipman, Rice and Cupp, in Tanner's office in the S.I.U. hall in River Rouge, Michigan. The following day, Chipman, Rice, and Cupp travelled to LaFollette, Tennessee, to purchase explosives from Virgil Brooks (another unindicted coconspirator). Meetings were held throughout the month of June, variously attended by Cupp, Rice, Chipman, Pearl, and Swait, at which plans were discussed to blow up the C & O and Lake Front Coal Docks in Oregon, Ohio, and a store in Maumee, Ohio, the owner of which also owned grain elevators in Maumee and Toledo. On two occasions, the evening of June 29 and the morning of July 1, 1963, Cupp placed dynamite on the Wabash railroad tracks in Maumee with the aim of stopping trains carrying grain from reaching the grain elevators and thus interfering with the loading of ships.

On July 3, 1963, at the S.I.U. hall in River Rouge, Tanner gave Cupp $150, part of which was reimbursement for his expenses. Cupp reported that his supply of explosives was nearly depleted and during the ensuing discussions, attended at a later point by Rice, a second trip to LaFollette was arranged. Rice and Cupp later travelled to LaFollette to obtain additional explosives from Brooks. On July 12, 1963 Pearl met with Cupp in Toledo and conveyed Tanner's wish that the transformers in the grain elevator area at the Mid-State Terminal in Toledo be bombed. That night Cupp carried out the plan. Early on August 1, allegedly at the instigation of Pearl, Cupp placed explosives on the Wabash railroad tracks in Toledo. On August 2, once again after meeting with Pearl, Cupp placed explosives underneath the New York Central tracks in Ashtabula, Ohio.

On September 5, 1963, at the S.I.U. hall in River Rouge, Cupp, Tanner, and Pearl discussed bombing a ship of the Upper Lakes Steamship Company, docked on the Calumet River in Chicago. Pearl accompanied Cupp that evening to "look over" the ship and obtained reservations for Cupp at a Chicago motel. On September 6, 1963 Cupp placed explosives near the *S.S. Howard L. Shaw*. After the bombing of the *Shaw*, Pearl and Tanner arranged to have Cupp employed as a seaman and leave from Houston for a two-month trip. Cupp and Pearl then arranged to have Brooks contact Pearl in order to carry on with Cupp's activities during his absence.

The Government's principal corroboration for Cupp's account was the testimony of three witnesses: Rene Turcotte, a member of the S.I.U. of Canada, testified to meeting Pearl in late July or early August of 1963 on two occasions and related statements made by Pearl about plans to bomb Upper Lakes Steamship Company ships. Guy Swadley, an unindicted coconspirator, testified that in June 1963, at the S.I.U. hall in Milwaukee, Pearl discussed the use of high-powered rifles on ships in order to slow down their loading and questioned Swadley about where explosives might be obtained.[3] Brooks related his dealings with Cupp in LaFollette during the summer of 1963. He also pointed out that Rice was similar in appearance to a man accompanying Cupp on one occasion, but admitted he was uncertain. Brooks testified to seeing Cupp in September or October 1963 in LaFollette and to making arrangements to meet with Pearl in Detroit. He then described meeting with Pearl at a Detroit hotel.[4]

Counsel for Rice and Chipman relied principally on alibi testimony for the period in question. By far the most important part of the defense of all appellants, however, consisted of attacks on Cupp's credibility since his per-

[3] The defense offered to impeach Swadley on cross-examination with a prior inconsistent statement signed in the office of a Milwaukee attorney. On redirect, however, Swadley reaffirmed his trial testimony and claimed that he had neither read the statement thoroughly when he signed it nor did he understand it.

[4] On cross-examination it was revealed that Brooks had given inconsistent testimony to the grand jury and to the FBI. He admitted that he had lied on these occasions out of fear of implicating Cupp and himself.

formance as a witness can best be described as chameleon-like. Cupp's trial testimony, which incriminated all four appellants, was an explicit repudiation of the account he had given at his severed trial. Furthermore, he had changed his story at least twice prior to his own trial. The circumstances surrounding these abrupt shifts were repeatedly emphasized by the defense and included the following. In March 1965 Cupp was in the United States Penitentiary at Terre Haute, Indiana, serving a five-year sentence for bombing railroad tracks in Marquette, Michigan. In December 1965 he was brought from Terre Haute to the Cook County Jail in Chicago. Between December 1965 and April 1966 he was questioned by the Federal Bureau of Investigation on several occasions. In April 1966 he testified before a grand jury against the appellants.[5] In December 1966 he was paroled after serving approximately twenty-one months of the Marquette sentence.[6]

Between May and July 1967 Cupp made several overtures to the defense for the purpose of recanting his grand jury testimony and accusing the Government of suborning perjury. On July 16, 1967 when Cupp and Pearl were to meet with Pearl's lawyer to notarize tape-recordings and written transcripts of Cupp's conversations with Pearl, the FBI arrested Pearl for failing to carry his draft card[7] and seized his briefcase containing the tapes and transcripts. That evening Cupp was arrested for illegal possession of a pistol and released on his own recognizance. Approximately three weeks later his parole was revoked, and he was returned to jail. From July 1967 through March 1968 Cupp continued to accuse the Government of subornation and claimed he would not be a government witness.

[5] Cupp did not, however, mention Rice in his grand jury testimony except to remark that he had not done any "jobs" with him.

[6] Testimony during the trial revealed that the Government had given Cupp some assistance in moving his family from Toledo to the Chicago area, getting him a job as a bus driver, and obtaining an unsecured loan from a Chicago bank. Cupp and his wife also received witness fees for their grand jury appearances.

[7] Charges against Pearl were subsequently dropped by the Government in December 1968.

Cupp's trial was severed from that of the other defendants in March 1968 and was held in the following May. Toward the end of 1968, Cupp recanted again, admitting to the FBI that he had committed perjury during his trial. In April and May of the following year, Rice, Chipman, Tanner, and Pearl were tried, and Cupp became the Government's pivotal witness. In August 1969 Cupp's ten-year sentence was reduced to one year.

Because of this history, Tanner and Pearl's principal challenge is directed at the admissibility, or alternatively, the credibility of Cupp's testimony, though they claim error in other aspects of the trial as well. Rice and Chipman claim that the trial judge erred in denying their motions for severance and their motions to dismiss several counts of the indictment as defective.

I

Appellants challenge the admissibility of Cupp's testimony on fourth amendment grounds. They claim that Pearl's arrest on July 16, 1967, which was subsequently declared unlawful by the trial judge, and the seizure of the contents of Pearl's briefcase including the tape recordings and transcripts, set off a chain of events leading ultimately to Cupp's return as the Government's star witness. Accordingly, appellants characterize Cupp's testimony as the "fruit" of an unlawful arrest under the authority of *Wong Sun* v. *United States*, 371 U.S. 471 (1962).

In *Wong Sun*, a defendant's admissions made during the course of an unlawful arrest and evidence later obtained as a result of these admissions were held to be inadmissible as the "fruits" of "official illegality." The crucial question was the relationship between the lawless conduct and the challenged evidence. "[W]hether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." 371 U.S. at 488.

In the instant case the trial judge held that the July 16 arrest was unlawful and, consistent with *Wong Sun*,

conducted a hearing on the defense motion to suppress. After extensively reviewing the contents of Pearl's briefcase, the judge assured appellants that if, "during the course of the trial . . . any evidence at all that the Government seeks to introduce is the product of a poisoned tree, the court will declare a mistrial and certainly would prevent that evidence from being introduced."

Appellants' challenge on appeal is directed only at the Government's use of the tapes found in Pearl's briefcase. But they do not claim the tapes should have been excluded from evidence; indeed, the tapes were exculpatory, and appellants sought to introduce them in their entirety. Nor do they argue that the Government gleaned any investigative leads from the tapes that resulted in uncovering other incriminating evidence. Rather, they claim that the method of obtaining Cupp's testimony constituted —in some undefined way—the illegal use to which the tapes were put.[8] Thus, they maintain that Cupp's trial testimony was the "fruit" of illegality to the extent that the arrest provided the instrumentalities, namely, the tapes, by which to coerce Cupp to become a government witness.

Clearly, the relationship between Cupp's testimony at appellants' trial in April 1969 and the tapes seized during Pearl's arrest in July 1967 is tenuous at best, particularly in the light of Cupp's undisputed reputation for unreliability. In any event, the argument in the instant case hinges on the charge that Cupp was coerced by the Government into changing his testimony at trial. Upon analysis this is not a fourth amendment challenge at all, but one which charges the Government with suborning perjury, which we find is baseless. The *sine qua non* of a charge

[8] Appellants claim another "fruit" of the illegal arrest. When the Government learned of the tapes, the defense lost the element of surprise. The Government now had "months and months . . . of opportunity to build up a neatly detailed 'case' refuting Cupp's secret revelations to Pearl in the tape-recordings." Appellants appear to be claiming that where an illegal search completely reveals the defense's strategy, the Government's entire case at trial can be seen as the "fruit" of the arrest. We need not consider at what point disclosures of the defendants' case taint the entire prosecution since we find that the Government was not materially surprised by the discovery of the tapes. *See Silverthorne Lumber Co., Inc.* v. *United States*, 251 U.S. 385, 392 (1920).

of subornation is that perjury has in fact been committed. Whether or not Cupp perjured himself at this trial was the principal issue before the jury. By its verdict, the jury decided he had not, and we may not legally controvert that determination.[9]

Appellants' second challenge to Cupp's testimony relates to his credibility. They claim that the testimony should be held incredible as a matter of law and thus inadmissible, pursuant to a finding of a denial of due process of law or to this court's supervisory jurisdiction. Credibility is preeminently a matter for the jury to determine. *Pinkowski* v. *Sherman Hotel,* 313 F.2d 190, 193 (7th Cir. 1963); *LaPresti* v. *Goodall Oil Co.,* 290 F.2d 653, 655 (7th Cir. 1961). Appellate review of credibility is prohibited absent extraordinary circumstances. In *Mesarosh* v. *United States,* 352 U.S. 1 (1956), the testimony of a government informer was held to have so tainted the proceedings against the defendants as to require a new trial with the challenged testimony excluded. *Mesarosh,* however, was not dealing with appellate review of a jury's prior determination of credibility. The witness in question was shown to have perjured himself on several occasions subsequent to the trial, information which was obviously unavailable to the jury. Moreover, it was the Government who raised the challenge to the credibility of its own witness.[10] In

[9] Appellants also claim that they did not have an adequate opportunity to demonstrate that electronic monitoring took place in derogation of the fourth amendment. The charge of illegal "bugging" was made on at least three occasions: at the suppression hearing of December 1967, in a separate suppression hearing prior to Cupp's severed trial, and in a third hearing held prior to the trial of the remaining four appellants. The Government denied these charges repeatedly and filed letters with the court from the Department of Justice indicating that, according to its records, no such monitoring had ever taken place. The trial judge was satisfied by this evidence. We find that appellants did receive an adequate hearing on this issue and see no basis for overturning the lower court's finding.

[10] The Court did make its own finding as to the credibility of the witness based on the new evidence of perjury before it, rather than remand the issue to the district court as requested by the Government. The case, however, was unusual in two respects: both as to the Court's determination of credibility, and as to the remedy of granting a new trial. The Court's findings regarding credibility seem to have been prompted by the fact that the Government was challenging its own witness. 352 U.S. at 10. Given the conclusion that the testimony was incredible, along with the Court's reasoning that a remand to the trial judge to reweigh the evidence would be inappropriate since a jury and not the judge had been the original trier of facts, the only remedy

Hoffa v. *United States*, 385 U.S. 293 (1966), a case more directly in point, the Court rejected the claim that the testimony of the principal government witness be held incredible as a matter of law, even where the witness was a paid informer who had contacted the Government while in prison, received clemency for his services and then ingratiated himself to the defendant in order to report on defendant's activities. The Court concluded that, however strong this informer's motives to lie may have been, "[t]he established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury." 385 U.S. at 311. In the instant case appellants' charges that the Government had used money and other favors to suborn Cupp's perjury were placed before the jury in the intensive cross-examination of Cupp. The jury took them into account and held them to be inconsequential. We will not challenge that determination.[11]

Appellants claim error in the refusal of the court to play the tapes seized during the July 16 arrest in their entirety. We are persuaded that this claim has no basis. The trial judge ruled that the tapes were to be used to impeach Cupp only in the event that Cupp denied making a specific statement at the time the conversation was recorded. The judge's reasoning was sound. Cupp never denied that he had made the recording or that the statements transcribed from the recording and read to him at cross-examination were his. He simply claimed that he had lied on that occasion. At one point in the proceedings, the judge was satisfied that the requirements for impeachment had been met and approved the playing of the tapes with the proviso that the defense counsel exclude those portions which did not specifically impeach

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[10] (Continued)
remaining was an order for a new trial. Ordinarily, a new trial will not be granted where the additional evidence is "merely cumulative or impeaching," and the challenger is the defense counsel. 352 U.S. at 9; *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 341, 357 (1962).

[11] We reject appellants' claim that the trial court erred in denying instructions relating specifically to Cupp's credibility. The requested instructions would have been tantamount to declaring Cupp's testimony incredible, which the trial court rightfully declined to do.

Cupp's trial testimony. No time limit was imposed so long as this requirement was followed. Moreover, the judge placed full responsibility for the editing on the defense counsel alone. When counsel began to play the tapes, the Government objected, claiming that an unedited version was being used. The judge agreed, but nevertheless ruled: "I will let you [the defense counsel] do it because you started doing it. . . ." After approximately eight minutes, the judge ordered the recorder stopped, and reiterated his direction that the tapes might be played again only if they were properly edited. We cannot say that the court abused its discretion in so ordering.

Appellants engage in an extended argument regarding the prejudicial effect of the Government's final summation. Their contentions bear discussion only with respect to one objection, the challenge to the prosecutor's statement that "when the government of the United States puts a witness on the stand, we vouch for his entire testimony." Considered alone, that statement would be outside the scope of remarks that a prosecutor may be permitted to make. *See Greenberg* v. *United States*, 280 F.2d 472 (1st Cir. 1960). Though we ordinarily would not countenance remarks of this nature, we cannot say that in the context of the instant case the prosecutor's statement requires reversal of these convictions.[12] No objections were made—nor were they appropriate—to the Government's opening remarks in its summation. The attorneys for Tanner, Pearl, and Rice responded with specific charges of subornation of perjury directed against several FBI agents and United States attorneys. Clearly, their attacks invited a response. *See Lawn* v. *United States*, 355 U.S. 339, 359 n. 15 (1957). The Government, in its rebuttal, countered each of the charges of undue influence. The quoted remark was simply a summary comment following these specific denials. Taken with the remarks preceding and following it, this statement only reaffirmed the Government's disclaimers of subornation. It did not suggest that Cupp's testimony ought be believed simply

[12] Counsel for Chipman was the only member of the defense to formally object to the Government's closing remarks. For the remaining defendants this issue is considered only with respect to the question of whether the Government's actions constituted "plain error" under FED. R. CRIM. P. 52(a).

on the authority of the United States Government,[13] and thus was not prejudicial. *United States* v. *D'Antonio*, 362 F.2d 151 (7th Cir. 1966).

Tanner and Pearl advanced other contentions regarding the conduct of the trial: that the court received evidence outside the scope of the indictment and that the trial court abused its discretion in denying the defense's request for a continuance. We are convinced that these contentions have no merit.

II

Rice and Chipman contend the trial judge erred in denying their motion for severance. Whether trials which have been properly joined under Rule 8, FED. R. CRIM. P., ought be severed pursuant to Rule 14, FED. R. CRIM. P., is a decision squarely within the discretion of the trial judge. Appellate review will hinge upon showing a clear abuse of discretion. *Tillman* v. *United States*, 406 F.2d 930 (5th Cir.) *cert. denied*, 395 U.S. 830 (1969); *United States* v. *Kahn*, 381 F.2d 824 (7th Cir.), *cert. denied*, 389 U.S. 1015 (1967); *United States* v. *Echeles*, 352 F.2d 892 (7th Cir. 1965). A defendant bears the burden of demonstrating that he has been prejudiced by the joinder; that burden is a difficult one. "The defendant must show something more than the fact that 'a separate trial might offer him a better chance of acquittal.'" *Tillman* v. *United States*, 406 F.2d at 935. Joinder must be shown to have rendered the trial unfair in order to counterbalance the Government's valid interest, as expressed in Rule 14, in avoiding a multiplicity of trials.[14] *Kroll* v. *United States*, 433 F.2d 1282, 1287 (5th Cir. 1970), *cert. denied*, 402 U.S. 944 (1971).

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[13] Chipman argues that even if these remarks were not prejudicial to his codefendants, whose accusations invited the Government's response, they were prejudicial to his own defense where he did not join in the charges. We disagree. Since we have held that the Government's remarks could only have been interpreted as responsive to the specific charges levelled against it, and since Chipman's attorney expressly disavowed all such charges, we cannot see how Chipman was impermissibly prejudiced.

[14] *See* 8 J. MOORE, FEDERAL PRACTICE ¶ 1404 [1] (2d ed. 1970); *Joint and Single Trials under Rules 8 and 14 of the Federal Rules*, 74 YALE L. J. 553, 566 (1965).

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The major argument for severance in the instant case stems from the fact that the attorneys representing Tanner and Pearl had defended the Government's star witness, Cupp, in his previous, severed trial. Faced with Cupp's explicit recantation of his prior testimony, counsel for Tanner and Pearl decided to go beyond attacking Cupp's credibility and sought to charge the Government with suborning perjury. The Government responded in kind, accusing Pearl and Tanner's counsel of subornation.

Rice and Chipman claim that the resultant charges and countercharges, repeated vitriolic exchanges and the introduction of information about "payoffs" and the like into evidence impermissibly prejudiced their trials.[15] We disagree. On the one hand, Rice cannot make that claim since his counsel joined in the fray, however reluctantly, during his closing remarks. On the other hand, Chipman's counsel took great pains to extricate his defense from that of the others. Moreover, the issues were not so complicated as to be beyond the "capacity of the jurors to follow the court's admonitory instructions" and "keep separate the evidence that is relevant to each defendant." *Peterson* v. *United States*, 344 F.2d 419, 422 (5th Cir. 1965).[16]

III

Rice and Chipman further claim that Count III of the indictment fails for duplicity. The Count charged all appellants with transporting explosives in interstate commerce with the intent of using them to damage "any building or other real or personal property . . . beginning

[15] This claim is distinguishable from that made in *Glasser* v. *United States*, 315 U.S. 60 (1941). In *Glasser*, the attorney representing one codefendant was assigned to defend the other codefendant notwithstanding the fact that they appeared to have inconsistent defenses. One codefendant then challenged this procedure on the grounds that he had been denied his sixth amendment rights to effective assistance of counsel. Rice and Chipman are not in a position to make this claim.

[16] Nor can we find any other ground for granting severance of the trials of Rice and Chipman. The fact that they were minor defendants, charged in only two of the seven-count indictment is not sufficient. *See United States* v. *Nomura Trading Co.*, 213 F. Supp. 704 (S.D. N.Y. 1963). In addition, though their defense strategy differed from that of counsel for Tanner and Pearl, it cannot be said that they were presenting mutually exclusive defenses likely to raise the kind of problems presented in *DeLuna* v. *United States*, 308 F.2d 140 (5th Cir. 1962).

on or about June 6, 1963 and continuing thereafter to about September 6, 1963 . . . from LaFollette, Tennessee, to divers other places and to Chicago, Illinois." Rice and Chipman moved to dismiss the Count or, alternatively, asked for a bill of particulars. The court only granted the latter request. The bill listed the "divers other places" to which explosives were transported as Detroit, Toledo, Woodhaven, Michigan, Monroe, Michigan, and Milwaukee. It stated the dates on which explosives were allegedly transported were "between June 7, 1963 and June 8, 1963", "on or about June 22, 1963", "on about June 26, 1963", "in the month of July 1963", and "in the months of August and September 1963". Despite this information, Rice and Chipman continued to object to the Count. Their objections were overruled.

The Government argues that Count III alleged only a single, continuing transaction "beginning on or about June 6, 1963 and continuing thereafter to on or about September 6, 1963." We disagree. Duplicity under Rule 8(a), FED. R. CRIM. P., "consists of charging in the same count of an indictment two or more separate offenses." *Optner* v. *United States*, 13 F.2d 11, 12 (6th Cir. 1926). A count is not duplicitous if it simply charges the commission of a single offense by different means. *Driscoll* v. *United States*, 356 F.2d 324 (1st Cir. 1966); *United States* v. *MacAlpine*, 129 F.2d 737 (7th Cir. 1942). The line between multiple offenses and multiple means to accomplish a single continuing offense is, however, especially difficult to draw in the instant case. The prohibited conduct is described in 18 U.S.C. § 837 as the act of transporting explosives in interstate commerce for the purpose of destroying any building or other real or personal property. Differentiating single offenses under this section requires defining at what point the act of transporting explosives is completed.

Clearly, the Government has some discretion in making this determination. Thus, in *Cohen* v. *United States*, 378 F.2d 751 (9th Cir.), *cert. denied*, 389 U.S. 897 (1967), the court upheld a count that charged defendants with knowingly transmitting wagering information by telephone between specified geographic points, during a specified time period, and for a specified purpose, even where a

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series of phone calls was involved. The Government in the instant case similarly argues that, although any part of the route between LaFollette, Tennessee and Chicago could comprise a separate trip and thus a separate offense, it was justified in construing each trip as part of the overall illegal scheme of transporting explosives across state lines. Indeed, fair judicial administration requires that prosecutors be encouraged to exercise their discretion to avoid unnecessarily cumulating offense categories and thereby cumulating punishments.

There are, however, limits to the Government's discretion. The act of transporting explosives cannot be so vaguely defined as to include successive trips, by different defendants, carrying different carloads of dynamite. The *Cohen* indictment was far more precise than the one before us; the challenged count alleged a series of phone calls between one defendant and two other parties, between Las Vegas and San Francisco, in the course of a single month. In the instant case, all four appellants were charged with transporting explosives at some time during the four-month period. Their individual roles are neither specified in the indictment nor in the bill of particulars. The Count as written could be interpreted to include more than one trip to LaFollette for the purpose of picking up explosives.[1] Moreover, the route described in each trip from LaFollette to Chicago is a circuitous one and required more time than would ordinarily be the case. The Government cannot delineate as a single offense all trips that occurred within a period of time, that involved the crossing of numerous state lines, that at some point crossed into the Northern District of Illinois, and that involved the varied participation of any one of four men. Each trip could be considered part of a continuing scheme to transport explosives only if the scheme were so broadly defined as to amount to a general conspiracy allegation rather than a substantive offense. Since Count III alleges a substantive offense, we find it duplicitous.

The duplicity of Count III would not require a dismissal if it were shown to constitute "harmless error" under Rule 52(a), FED. R. CRIM. P. The prohibition against

[1] Evidence subsequently presented at trial did in fact show that the Government intended to prove at least two separate trips to LaFollette.

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duplicity is designed to protect a defendant's right under the sixth amendment to notice of the "nature and cause of the accusation" against him so that he may prepare a defense, and to guard against the possibility that "confusion as to the basis of the verdict may subject the defendant to double jeopardy in the event of a subsequent prosecution." 8 J. Moore, Federal Practice ¶ 8.03[1], at 8-6, 7 (2d ed. 1970). The Government claims that the first policy was effectuated by pre-trial discovery, the revelation of Cupp's grand jury testimony to the defense at the inception of the trial, and Cupp's prior trial on the same Count. We disagree. The Government's case against Cupp did not adequately reveal the case they were to bring against each of the individual defendants. Cupp's grand jury testimony was disclosed immediately before trial and thus at a comparatively late stage in the proceedings. Finally, though the Government characterizes the pre-trial discovery as "extensive," it does not specify how discovery cured the defects of the indictment. In any event, the Government ignores the second policy—the protection against double jeopardy—which remains a compelling consideration in the instant case. *United States* v. *Leggett*, 312 F.2d 566, 570 (4th Cir. 1962); *United States* v. *Warner*, 428 F.2d 730, 735 (8th Cir.), *cert. denied*, 400 U.S. 930 (1970).

We find no merit to the remaining contentions of these appellants regarding the impeachment of one of Rice's defense witnesses, nor the sufficiency of the evidence against Chipman.

IV

In addition, Rice and Chipman challenge Count IV of the indictment for failing to allege acts that fall within the "special maritime and territorial jurisdiction of the United States." We fail to see how Rice and Chipman have standing to raise this claim since neither were indicted for the substantive offense charged. The offense charged in Count IV affected the trial of these appellants only insofar as it was one of the several unlawful objects alleged in the conspiracy count. However valid appellants' claim is on this issue, it does not affect their convictions

on the conspiracy count so long as any one of the objects of the conspiracy is unchallenged.

Tanner and Pearl, who were charged under Count IV, join in Rice and Chipman's attack on this Count.[18] In addition, Pearl alleges that his conviction under Count I of the indictment is barred by the fifth amendment prohibition against double jeopardy. Neither of these appellants, however, has directed any specific attack against the validity of the remaining Count of the indictment, Count VII.[19]

Until recently, the validity of Count VII would have rendered unnecessary further inquiry into the validity of Count IV where Tanner is concerned, and Counts I and IV where Pearl is concerned. Appellate review would here be avoided since Tanner and Pearl's sentences under Count VII are concurrent with the sentences assessed under all other counts of the indictment. *Lawn* v. *United States,* 355 U.S. 339, 359 (1957); *Hirabayashi* v. *United States,* 320 U.S. 81, 85 (1942). But the Supreme Court's decision in *Benton* v. *Maryland,* 395 U.S. 784, 791 (1969), constitutes a reevaluation of the "concurrent sentencing doctrine." *Benton* holds that there is no jurisdictional bar (stemming from the requirement of justiciability) to a consideration of all counts under concurrent sentences. The Court points out that an unreviewed count could increase an appellant's future sentencing under an habitual offender statute, or adversely affect his chances for parole, or be used to impeach his testimony at a future trial. *Benton* suggests that review is desirable where adverse collateral consequences of this nature may flow from conviction. *See Davie* v. *United States,* 447 F.2d 480 (7th Cir. 1971); *United States* v. *Febre,* 425 F.2d 107 (2d Cir. 1970), *cert. denied,* 400 U.S. 849 (1971).

[18] Pearl and Tanner claimed to join in the arguments of Rice and Chipman "where applicable." We point out that they ordinarily may not do so where it can be shown that they did not properly object to, nor join the objections of the other defense counsel, unless the defect involved can be characterized as "plain error."

[19] Count VII alleged that "appellants Tanner and Pearl knowingly and unlawfully set fire to a vessel of foreign registry, namely, the *S.S. Howard L. Shaw* and did place bombs and explosives in and upon such vessel . . . while within the jurisdiction of the United States . . . in violation of 18 U.S.C. § 2275." We accept the view that the phrase "within the jurisdiction of the United States" has been broadly construed.

Since we cannot say that there is no possibility of undesirable collateral consequences attendant upon these convictions, we choose to consider the validity of all the challenged counts.

Count IV charges these appellants with willfully and maliciously destroying a structure, a dock at the Calumet Harbor, and a vessel, the *S.S. Howard L. Shaw*, within the special admiralty and territorial jurisdiction of the United States in violation of 18 U.S.C. § 1363. The "special maritime and territorial jurisdiction" of the United States is generally defined in 18 U.S.C. § 7; since the *Shaw* was a vessel of Canadian registry and ownership, these offenses will qualify for federal criminal jurisdiction only if they come within the bounds of 18 U.S.C. § 7(1).[20] The Government must show that the destruction of the *Shaw* occurred either upon the "high seas" or upon any other body of water that is both within the United States' admiralty and maritime jurisdiction and without the jurisdiction of any particular state.

The explosion of the *Shaw* took place while the vessel was docked at the Calumet Shipyard Dock in the Calumet Harbor, a location that cannot be characterized as "high seas." While the Great Lakes and the connecting waterways between some of the Great Lakes have been held to qualify as "high seas," *United States* v. *Rodgers*, 150 U.S. 249 (1893), *Hoopengarner* v. *United States*, 270 F.2d 465 (6th Cir. 1959), we cannot say—as the Government urges—that there is authority to extend that category to a waterway connecting one of the Great Lakes with other waterways in the State of Illinois and ultimately, with the Gulf of Mexico. Such a construction would extend the "special maritime and territorial jurisdiction" of the United States beyond recognition.

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[20] 18 U.S.C. § 7(1) defines the special maritime and territorial jurisdiction of the United States as follows:

> The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

Nor can we say that offenses occurring within the Calumet Harbor fit into the second applicable category of 18 U.S.C. § 7(1). Since the words "out of the jurisdiction of any particular state" suggest that there can be no concurrent federal and state jurisdiction, a finding of state jurisdiction is conclusive. There is little doubt that the events surrounding the explosion of the *Shaw* occurred within the jurisdiction of the State of Illinois. *See* Chicago Regional Port Dist. Act, ILL. REV. STAT., ch. 19, §§152-178. We agree, then, that the offenses charged in Count IV fail to qualify for federal jurisdiction under 18 U.S.C. § 1363.

Finally, Pearl attacks Count I as violative of the double jeopardy provision of the fifth amendment. His claim is based upon an indictment dated August 24, 1963 brought against Pearl and Cupp for conspiracy to bomb railroad tracks in Marquette, Michigan during the period from June 15, 1963 to the date of the indictment. That Pearl was placed in jeopardy as a result of this indictment was clear. After the jury had been impaneled and evidence taken, Cupp entered a plea of guilty to the conspiracy count of the indictment, and the Government chose to dismiss all counts against Pearl.

It is also apparent that the challenged count in the instant case describes a conspiracy which substantially overlaps with the offense charged in the Marquette indictment. Indeed, the Government concedes that the Marquette charge was a "sub-agreement" of the overall plan alleged in the current prosecution. The conspiracy with which Pearl is here charged is claimed to have run from April to September 1963 and to have involved the bombing of railroad tracks and grain elevators in Ohio and the bombing of the *S.S. Howard L. Shaw* in Chicago. The first indictment charged a conspiracy lasting from June 15 to August 24, 1963 to blow up railroad tracks in Marquette. The governing constitutional principle is that a single continuing conspiracy, however diverse its objects, cannot be broken down into component sub-agreements for the purpose of multiple punishments or multiple prosecutions. *Braverman* v. *United States*, 317 U.S. 49, 53 (1942); *United States* v. *Palermo*, 410 F.2d 468 (7th Cir.

1969); *United States* v. *Varelli*, 407 F.2d 735 (7th Cir. 1969).[21]

The Government claims an exception to this rule where it was unaware of all the defendant's crimes at the time of the initial proceedings. *See Ashe* v. *Swenson*, 397 U.S. 436, 453 n. 7 (1969) (concurring opinion); *United States* v. *Buonomo*, 441 F.2d 922 (7th Cir. 1971). But that exception raises very difficult problems of analysis particularly where the Government's investigation evolves slowly over a period of months. It is often not a question of the Government knowing the exact parameters of the second offense even while prosecuting the first, or alternatively, having no inkling of any further offenses. There may be intermediate stages ranging anywhere from vague intimations to strong suspicions. We are of the view that even where the Government only has strong suspicions of a larger continuing conspiracy, but does not have sufficient evidence to proceed to indictment, it cannot be permitted, consistent with *Braverman*, to fragment prosecution so as to insure that some offenders will come to trial and thereby avoid the risks of a single conspiracy prosecution.

In the instant case, though we agree that the Government did not know the exact scope of the general conspiracy when the Marquette indictment was brought, we cannot agree that it was completely ignorant. Cupp's grand jury testimony suggested that the dynamiting of the railroad tracks in Marquette was part of a continuing agreement between Cupp and Pearl to obstruct commerce in the hopes of influencing the dispute between the Upper Lakes Shipping Company and the S.I.U. The indictment itself suggests that other participants were suspected; Cupp and Pearl were charged with conspiring with each other "and with divers other persons whose names are to the Grand Jury unknown." Finally, by the time the indictment was handed down, August 24, there had already been three bombings of railroad tracks in the Great Lakes area: July 1 at Maumee, August 1 at Toledo, and August 2 at Ashtabula. It is reasonable to assume that by August 24 the Government had good grounds to suspect the existence of a single conspiracy aiming at acts of violence in the

[21] The facts of *Braverman* are limited only to the problem of cumulating punishments in a single prosecution, but the court's rationale applies to both the situations of multiple punishments and of multiple prosecutions.

Great Lakes area, centering around the ongoing S.I.U.-Upper Lakes labor dispute, and including Cupp and Pearl. Where the Government was aware of the larger conspiracy to this extent, we cannot find any justification for multiple prosecutions.

Although we have chosen to consider the counts under concurrent sentences challenged by the appellants because of the possibility of prejudice and have found them to be invalid, we see no reason to require remand for resentencing or for a new trial rather than confining our relief to a reversal of the convictions under these counts. Where we find that the prejudice from the challenged counts is likely to be limited to the possibility of future adverse collateral consequences rather than from the conduct of the past trial and sentencing of valid and invalid counts, reversal of the convictions under the invalid counts is sufficient. *See The Federal Concurrent Sentence Doctrine*, 70 Col. L. Rev. 1099 (1970). In *Benton* v. *Maryland*, 395 U.S. 784 (1969), the Court remanded the case in order to determine whether the invalid larceny count tainted the trial of the remaining burglary count since questions of state evidentiary rules were involved. The instant case presents no such problem. In *United States* v. *Febre*, 425 F.2d 107 (2d Cir. 1970), *cert. denied*, 400 U.S. 849 (1971), the court held two out of four counts of an indictment invalid on appeal, but ruled that only reversal was necessary. A new trial was not required since the court found that the evidence under the invalid counts would have been admissible under the valid conspiracy count and since it found it unlikely that evidence on the invalid counts had been considered by the jury to establish guilt on the remaining substantive count. Similarly, in this appeal evidence introduced on Count III which charged transporting explosives in interstate commerce was easily distinguishable from evidence on the remaining valid substantive count, Count VII, which dealt with the actual explosion of the *Shaw*. Evidence under Count IV would be admissible under Count VII in any event since elements of the two offenses are similar. Where appellant Pearl is concerned, trial on the substantive count of the indictment remains valid even where the conspiracy count falls for double jeopardy. *Pinkerton* v. *United States*, 328 U.S. 640 (1945). Moreover, extrajudicial statements of codefendants would be admissible once a conspiracy or a joint venture had been

shown whether or not it was specifically charged in the indictment. *See United States* v. *Schroeder*, 433 F.2d 846 (8th Cir. 1970). Finally, as in *Febre*, resentencing is unnecessary where it is unlikely that remand will yield a reduction in sentence. Sentencing for Tanner and Pearl under Count VII was for five out of a possible twenty years; and, for Rice and Chipman sentences under Count I were suspended with five years' probation.[22]

Accordingly, we reverse all convictions under Counts III and IV of the indictment, and Pearl's conviction under Count I, but affirm convictions under all other Counts.[23]

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Clerk of the United States Court of Appeals for the Seventh Circuit.

[22] However, since the starting date for this probationary period depended upon completion of their sentences under Count III, resentencing as to these two defendants for purposes of clarification is required.

[23] During oral argument counsel for Tanner and Pearl requested leave to file a motion dealing with Cupp's activities during the pendency of this appeal. We suggested that defense counsel file a written request for leave to file such a motion outlining his reasons why the motion should be filed and giving the Government time to respond. The request for leave to file this motion and the Government's response thereto have been received.

Appellants Tanner and Pearl's request indicates that the basis for relief in their proffered motion is "the fact that the Government's trial witness Alvin Junior Cupp has been contacting defense representatives—and has been making statements to said defense representatives, being a recantation of his trial testimony." They seek to show by way of affidavits of counsel and of a defense investigator the existence and extent of the latest Cupp recantation. Furthermore, in the affidavits supporting their proffered motion, Tanner and Pearl ask the court to reverse their convictions based on constitutional grounds for a violation of due process or based upon the court's supervisory capacity and remand the case for a new trial.

Since the proffered material is offered for the first time on appeal, was not considered by the district court, and is totally outside the record, it may not be afforded cognizance by this court except for the limited purpose of considering whether the case should be remanded to the district court when encompassed in a motion for a new trial under Rule 33, FED. R. CRIM. P. *Metcalf* v. *United States*, 195 F.2d 213 (6th Cir. 1952); *Wagner* v. *United States*, 118 F.2d 801 (8th Cir.), *cert. denied*, 314 U.S. 713 (1941). On the basis of the representations contained in the request to file the proffered motion, we decline to remand the case, but without intimating our view with regard to its merits if the material is brought before the district court through a motion under Rule 33. For the foregoing reasons we deny the request to file the motion.

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Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

March 3, 1972

Before:

HON. LUTHER M. SWYGERT, *Chief Judge*
HON. THOMAS E. FAIRCHILD, *Circuit Judge*
HON. WILBUR F. PELL, JR., *Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

No. 17917, 17918, and 17919

JOSEPH ALFRED TANNER, JACK ALTER PEARL, WALTER BERYL CHIPMAN, AND LAWRENCE HENRY RICE,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

Judgment of the Court of Appeals

On consideration whereof, it is ordered and adjudged by this court that the convictions under Counts III and IV of the indictment, and Pearl's conviction under Count I of the said District Court in this cause appealed from be and the same is hereby reversed, but the convictions under all other Counts be and the same are hereby affirmed, in accordance with the opinion of this Court this day.

A true copy tested this day.

WILLIAM H. PITTMAN

Deputy Clerk of the United States Court of Appeals for the Seventh Circuit.

Statutes and Court Rule Involved

18 U.S.C. § 837

§ 837. EXPLOSIVES; ILLEGAL USE OR POSSESSION; AND, THREATS OR FALSE INFORMATION CONCERNING ATTEMPTS TO DAMAGE OR DESTROY REAL OR PERSONAL PROPERTY BY FIRE OR EXPLOSIVES

(a) As used in this section—

"commerce" means commerce between any State, Territory, Commonwealth, District, or possession of the United States, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory, or possession of the United States, or the District of Columbia;

"explosive" means gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuzes (other than electric circuit breakers), detonators, and other detonating agents, smokeless powders, and any chemical compounds or mechanical mixture that contains any oxidizing and combustible units, or other ingredients, in such proportions, quantities, or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound or mixture or any part thereof may cause an explosion.

(b) Whoever transports or aids and abets another in transporting in interstate or foreign commerce any explosive, with the knowledge or intent that it will be used to damage or destroy any building or other real or personal property for the purpose of interfering with its use for

educational, religious, charitable, residential, business, or civic objectives or of intimidating any person pursuing such objectives, shall be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both; and if personal injury results shall be subject to imprisonment for not more than ten years or a fine of not more than $10,000, or both; and if death results shall be subject to imprisonment for any term of years or for life, but the court may impose the death penalty if the jury so recommends.

(c) The possession of an explosive in such a manner as to evince an intent to use, or the use of, such explosive, to damage or destroy any building or other real or personal property used for educational, religious, charitable, residential, business, or civic objectives or to intimidate any person pursuing such objectives, creates rebuttable presumptions that the explosive was transported in interstate or foreign commerce or caused to be transported in interstate or foreign commerce by the person so possessing or using it, or by a person aiding or abetting the person so possessing or using it: *Provided, however,* That no person may be convicted under this section unless there is evidence independent of the presumptions that this section has been violated.

* * * * *

(e) This section shall not be construed as indicating an intent on the part of Congress to occupy the field in which this section operates to the exclusion of a law of any State, Territory, Commonwealth, or possession of the United States, and no law of any State, Territory, Commonwealth, or possession of the United States which would be valid

in the absence of the section shall be declared invalid, and no local authorities shall be deprived of any jurisdiction over any offense over which they would have jurisdiction in the absence of this section. Added Pub.L. 86-449, Title II, § 203, May 6, 1960, 74 Stat. 87.

18 U.S.C. § 1992

§ 1992. WRECKING TRAINS

Whoever willfully sets fire to, or places any explosive substance on or near, or undermines any tunnel, bridge, viaduct, trestle, track, signal, station, depot, warehouse, terminal, or any other way, structure, property, or appurtenance used in the operation of any such railroad in interstate or foreign commerce, or otherwise makes any such tunnel, bridge, viaduct, trestle, track, signal, station, depot, warehouse, terminal, or any other way, structure, property, or appurtenance unworkable or unusable or hazardous to work or use, with the intent to derail, disable, or wreck a train, engine, motor unit, or car used, operated, or employed in interstate or foreign commerce; or

Whoever willfully attempts to do any of the aforesaid acts or things—

Shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

* * * * *

18 U.S.C. § 2275

§ 2275. FIRING OR TAMPERING WITH VESSELS

Whoever sets fire to any vessel of foreign registry, or any vessel of American registry entitled to engage in commerce with foreign nations, or to any vessel of the United States,

or to the cargo of the same, or tampers with the motive power or instrumentalities of navigation of such vessel, or places bombs or explosives in or upon such vessel, or does any other act to or upon such vessel while within the jurisdiction of the United States, or, if such vessel is of American registry, while she is on the high sea, with intent to injure or endanger the safety of the vessel or of her cargo, or of persons on board, whether the injury or danger is so intended to take place within the jurisdiction of the United States, or after the vessel shall have departed therefrom and whoever attempts to do so shall be fined not more than $10,000 or imprisoned not more than twenty years, or both. June 25, 1948, c. 645, 62 Stat. 804.

Rule 33, F.R. Cr. P.

RULE 33. NEW TRIAL

The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period. As amended Feb. 28, 1966, eff. July 1, 1966.